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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

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VOL. XL.

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JUDGES
OF THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK,
DURING THE TIME OF THIS VOLUME OF REPORTS.

CLAUDIUS L. MONELL,
Chief Justice.
JOHN J. FREEDMAN,
WILLIAM E. CURTIS,
JOHN SEDGWICK.
HOOPER C. VAN VORST,
GILBERT M. SPEIR,
CHARLES F. SANFORD,*
Judges.

* Elected in place of JOHN J. FREEDMAN, whose term of office expired December 31, 1875.

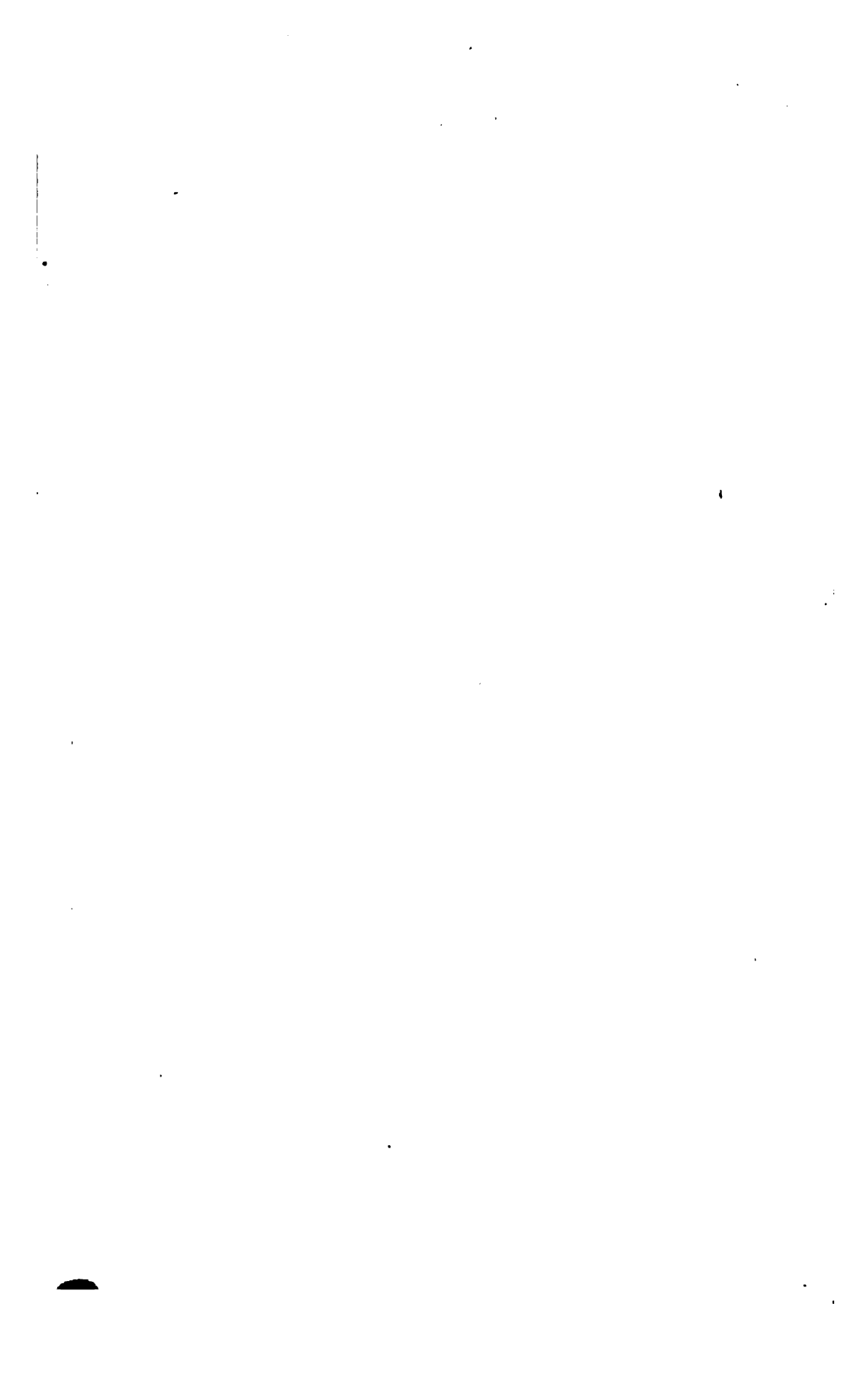


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CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK

AT GENERAL TERM.

JASPER P. ROE, PLAINTIFF AND RESPONDENT, *v.*
CHRISTINA ROE, DEFENDANT AND APPELLANT.

I. DIVORCE A VINCULO.

1. WITNESS. PARTY DEFENDANT. ACT OF 1867, CH. 887.

1. *Incompetent as a witness for any purpose other than proving the fact of marriage.*

II. EVIDENCE.—HANDWRITING.

1. COMPARISON, PROOF OF BY.

a. What may be compared.

1. The writing of the document in dispute alleged to have been written by a witness on the stand may be *compared with the writing of words contained in said document written by such witness while on the stand.*

2. EXPERTS, PROOF BY.

1. *They may testify to the condition and appearance of the words, and of the letters, and characters, contained in the writings, and point out, and explain similarities and differences.*

1. OBJECTIONS TO EVIDENCE BY AN EXPERT.

1. *What not maintainable on appeal.*

a. An objection at the commencement of his examination, to questions designed to show his business, his ability, knowledge, and skill, on the ground of immateriality, is not.

Statement of the Case.

b. A general objection "to this class of evidence" to questions having such design in view is not.

1. If subsequent questions and answers *exceed the limit* to which an expert can testify, *further and specific* objections should be interposed.

Before FREEDMAN and SEDGWICK, JJ.

Decided August 3, 1875.

This was an action for a divorce *a vinculo matrimonii*. On the trial the plaintiff called the alleged paramour, and in the course of the direct examination showed him a letter and asked him whether he wrote it. The court instructed the witness he might decline to answer whether he wrote the letter or not. The witness declined to answer on the ground that his answer would criminate himself. On cross-examination, defendant's counsel asked him to write a little, whereupon the witness wrote the address and first line of the letter in question. Thereafter plaintiff called as a witness, Henry M. Parkhurst, when the following evidence was given by him, objections taken, and rulings made:

"I have, for a long time, been engaged in the business of writing and seeing other people write.

Q. And examining handwritings and comparing them?

[Objected to as immaterial. Objection overruled. Defendant excepts.]

A. I am familiar with handwriting, and differences of handwriting. [Defendant's counsel objects to this class of evidence. Objection overruled. Defendant excepts.] I have no doubt, whatever, that the letter, which I have in my hand, and that sentence, which was written by the witness here, were written by the same person, in the same hand; I form this opinion, somewhat, from the general appearance, but more particularly, from the peculiar forms of the letters and

Statement of the Case.

their peculiar connections ; some of the letters are made different in the two, but there are very remarkable peculiarities which are identical in the two, and many of them ; I have no doubt upon the subject at all ; I have no doubt the superscription upon the envelope is the same handwriting."

Plaintiff then read the letter, its envelope, and the slip written on by the former witness on the trial, in evidence.

The letter had a tendency to prove the adultery charged.

After the plaintiff had rested, defendant's counsel called the defendant as a witness on her own behalf ; and evidence was given, objections raised, and rulings made, as follows :

"I am defendant. I saw a man named Henry Miller once ; I forget the day of the month I saw him ; it was in April ; it was at the time Mr. Jessee was there ; that was the only time ; I never saw him but once ; I never bought any prize packages, and I didn't know what he was doing ; I never received any letter."

[Mr. Hirsch proposes to ask the witness whether she ever had any adulterous intercourse with Henry Miller. Objected to as incompetent. Objection sustained. Mr. Hirsch stated that he proposed to examine the witness as to what took place, in the presence of herself and Mr. Roe, at the time Mr. Jessee went there with the plaintiff. Objected to. Objection sustained. Exception by defendant.]

. The court also struck out all the evidence of the defendant, to which ruling the defendant excepted.

There was in addition to the testimony of the paramour, a great deal of circumstantial evidence in support of the charge of adultery.

The court below found in favor of the plaintiff ; and judgment of divorce *a vinculo* was thereupon entered in his favor.

Appellant's points.

From the judgment, defendant appealed.

Samuel Hirsch, attorney, and of counsel for appellant, urged:—I. It has been uniformly held in actions of this kind that while to authorize a divorce for adultery, direct testimony of the commission of the crime is not required, yet the proximate facts must lead, by fair inference, to a necessary conclusion—a conclusion so far inevitable that the supposition of innocence, can not by any just course of reasoning, be reconciled with it (17 *Abb. Pr. Rep.* 48, anonymous; *Mulock v. Mulock*, 1 *Edw. Rep.* 14; *Hart v. Hart*, 2 *Ed.* 207; *Turney v. Turney*, 4 *Id.* 566; *Banta v. Banta*, 3 *Id.* 295). The complaint itself is defective in not stating the acts of adultery with sufficient certainty (*Pramagiori v. Pramagiori*, 7 *Rob.* 302; also *Wood v. Wood*, 2 *Paige Rep.* 108). Where the evidence of adultery in an action for divorce depends on the testimony of defendant's paramour, unsupported by other evidence, no decree will be granted; he is regarded as an accomplice, and his testimony subject to the objection of an accomplice (5 *Rob.* 611).

II. There is no proof of any adultery at any time such as would warrant a decree for divorce (*Myer v. Myer*, 48 *Barb.* 114; *Hamburger v. Hamburger*, 46 *How.* 346; *Ferguson v. Ferguson*, 3 *Sand.* 307; *Trust v. Trust*, 11 *How.* 523). There can also be no decree for adultery committed after the filing of the bill. In this action the bill is filed or the action commenced April 11, 1873, the very day of the alleged meeting. The finding of fact in respect to the adultery is April 12, and after the commencement of the action (*Ferrier v. Ferrier*, 4 *Edw.* 296).

III. It was error to allow the witness Parkhurst, as an expert, to swear to the letter of Miller by mere comparison of the letter with a paper written by Miller, and marked for identification (*Jackson v. Phillips*, 9

Respondent's points.

Cow. 94; *Wilson v. Kirkland*, 5 *Hill*, 182; *People v. Spooner*, 1 *Johns.* 343; *Bar v. Coleman*, 13 *Barb.* 42; *Tillford v. Knott*, 2 *Johns. Chan. Cases*, 211; *Jackson v. Van Duzen*, 5 *Johns. Rep.* 144; *Haskin v. Stuyvesant*, *Anthon. Nisi Prius*, 132; *Van Wyck v. McIntosh*, 14 *N. Y.* [4 *Ker.*] 439).

IV. The testimony of the defendant should not have been stricken out, and she should have been allowed to give the evidence offered. (a.) Such admission would not necessarily have been in contravention of the provisions of the act of 1867 (*Laws of 1867*, ch. 887, § 2; §§ 388 and 399 of *Code*; *Wehrkamp v. Willets*, 1 *Keyes*, 250; *Shoemaker v. McKee*, 19 *How.* 86; *March v. Potter*, 30 *Barb.* 506; *Chamberlain v. People*, 23 *N. Y.* [9 *Smith*] 85; *Rivenburg v. Rivenburg*, 47 *Barb.* 419). In this case special attention is asked to the dissenting opinion of Judge BALCOMB (1 *Greenleaf on Evidence*, 287, § 254).

Garretson & Mayo, attorneys and of counsel for respondent, urged:—I. As to the adultery, the law does not exact, in cases of this nature, such precise and incontrovertible proof as it requires in many other actions. The direct fact need not be proven. It may be inferred from circumstances that lead to it as a necessary conclusion (*N. Y. Sup'r Court*, *Ferguson v. Ferguson*, 3 *Sandf.* 307, citing Lord STOWELL in *Loveden v. Loveden*, 2 *Hagg. Consis. Rep.* 1).

II. The statute making parties to actions competent as witnesses does not apply to cases brought by husband or wife, the one against the other, for divorcement on the ground of adultery. The defendant's testimony was properly excluded (*Smith v. Smith*, 15 *How.* 165; *Sweet v. Sweet*, *Id.* 169; *C. v. C.*, 25 *Id.* 432).

III. The letter purporting to have been written by Henry Miller to the defendant was written by him to

Opinion of the Court, by FREEDMAN, J.

her. The testimony of Henry M. Parkhurst refers to a comparison of the writing called for by the defendant's counsel from Henry Miller on the examination of that witness, with the letter in proof and appearing at large in the case. The rule which in this state rejects proof of handwriting of a paper sought to be put in proof by comparing it with the handwriting of another paper proven to have been written by the same person, applies solely where it is attempted to compare the handwriting of the paper sought to be introduced with that of one which is immaterial to the issue (*Van Wyck v. McIntosh*, 14 *N. Y.* [4 *Ker.*] 439). Such is not this instance. Here a portion of the very letter itself is introduced by the defendant's counsel, and the evidence is perfected by a comparison of what was so written with the same paper in its entirety.

BY THE COURT.—FREEDMAN, J.—The evidence fully sustains the finding that between the 1st day of May, 1872, and the 12th day of April, 1873, the defendant did commit adultery with one Henry Miller. Direct testimony of the commission of the offense is not necessary, but circumstantial evidence which by fair inference irresistibly points to that conclusion is sufficient. Tested by this rule the facts testified to by the witnesses Maria Palmer, Celia Denuing, Walker, and Henry Lewis, all of whom were properly admitted, would be sufficient even without the testimony of the paramour. The learned chief justice who tried the case below, had these witnesses before him, and not only heard their testimony, but also observed the manner in which they gave it. He was therefore even in a better position to judge of their credibility than the court at general term can be. Their testimony was not shaken or impeached, and aside from such contradictions upon collateral points as usually appear between the testimony of witnesses testifying to successive occurrences.

Opinion of the Court, by FREEDMAN, J.

it bears no intrinsic marks for which it could be discredited. As a whole it is wholly incompatible with defendant's innocence, and no inference other than that of criminality is possible from it.

The testimony of the defendant was properly excluded. Before the act of 1867 (ch. 887 of *Laus of 1867*), she would not, under the Code, have been a competent witness in her own behalf in an action for divorce (*Rivenburgh v. Rivenburgh*, 47 *Barb.* 419), and that act, though making the husband or wife of any party to an action as competent a witness on behalf of such party as any other witness, expressly provides that nothing therein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage.

The first objection to the testimony of the expert on the question of handwriting is wholly untenable, and the second too general in its character. The authorship of the letter alleged to have been written by the paramour to the defendant, and claimed to have been found by the plaintiff in defendant's possession, was material, and a comparison of the handwriting of that letter with the few lines written by the paramour on the witness-stand at the request of the counsel for the defendant was to a certain extent permissible. The expert could properly testify to the condition and appearance of the words and of the letters and characters contained in these writings, and to point out and explain similarities and differences. If by subsequent questions and answers this limit allowed by law was transcended, a further and specific objection should have been interposed. A general objection taken at the beginning "to this class of evidence," or "on the ground of immateriality," is not enough.

Appellant's points.

The judgment should be affirmed.

SEDGWICK, J., concurred.

ELIZA PAYNE, AS ADMINISTRATRIX, &c., OF WILLIAM D. PAYNE, DECEASED, PLAINTIFF AND APPELLANT, v. THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY, DEFENDANT AND RESPONDENT.

I. CARRIER OF PASSENGERS.

1. NEGLIGENCE OF CARRIER—WHAT IS NECESSARY TO ESTABLISH.

1. Something *more* must be shown *than a probability* that the carrier was negligent; there must be *some element of moral certainty and exclusion of reasonable doubt*.

1. Example of a case not falling within this rule.

a. The case is stated in the opinion as shortly as it is possible to state it.

II. EVIDENCE.

1. COMPROMISE, OFFER OF, NOT ADMISSIBLE IN EVIDENCE.

1. This, though the party sued was the one who made the offer, and *before making it had investigated* the matters out of which the suit arose, and at the time of making it, *neither admitted nor denied his liability*.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal by plaintiff from a judgment. The facts sufficiently appear in the opinion.

Tracy, Olmstead & Tracy, attorneys; *C. E. Tracy*

Appellant's points.

and *G. W. Ellis*, of counsel for appellant, urged :—
 I. The circumstances detailed in evidence show that the “break-up,” testified to by the witness McDermot, was for the purpose of allowing the boy to alight, in accordance with a request to the drivers to stop the car; no other reason or motive for stopping was proved; the car, however, was continued in motion afterwards for over half a block and the width of Eighteenth street, and the boy evidently was thrown from the car while standing on the platform waiting for the car to stop. These facts would have justified a finding of negligence in the drivers, and entitled the plaintiff to have the question submitted to the jury (*Mulhado v. Brooklyn City R. R. Co.*, 30 *N. Y.* 370; *Mettlestadt v. Ninth Avenue R. R. Co.*, 4 *Robt.* 377). “That there is more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard.”—
 Per ALLEN, J. (*Filer v. N. Y. Central R. R. Co.*, 49 *N. Y.* 51).

II. “A common carrier, in offering to take passengers, must give free ingress and egress, and is liable for any damage which may occur to such passengers from his negligence in not securing them from risk, when approaching or leaving the carriage” (*Wharton on Negligence*, §§ 652, 821; *Crocheron v. Ferry Co.*, 1 *Supreme Ct. R.* 447; *Filer v. N. Y. Central R. R. Co.*, above). The carrier becomes liable for an injury occurring to one taking a dangerous position, notwith-

Appellant's points.

standing rules and notice, if with his acquiescence (Smith v. Terry Co., 5 *Supreme Ct. R.* 689).

III. The car was overloaded, and if the jury should find that that contributed to the accident, defendant was guilty of negligence, and is liable accordingly (*S. L.* 1860, Ch. 515). "Every person while violating an express statute, is a wrong-doer, and as such is *ex necessitate* negligent in the eye of the law." Per DAVIS, J. (Jetter v. N. Y. & H. R. R. Co., 2 *Keyes*, 154; Beisegel v. N. Y. Central R. R. Co., 14 *Abb. N. S.* 35; Ryan v. Thompson, 6 *Jones & Spencer*, 133; Israel v. Clark, 4 *Esp.* 259.) In such a case the defendant can excuse his default only by proof of concurring circumstances beyond his control. No such proof was offered (*Wharton on Negligence*, § 128); Sheridan v. Brooklyn, &c., R. Co., 36 *N. Y.* 39).

IV. More care towards the young is required than towards others. . . . In the case of young persons, the jury are not bound to require the same demureness and caution as in the case of an older person (O'Mara v. Hudson R. R. Co., 38 *N. Y.* 449; Haycroft v. L. S. & M. S. R. Co., 5 *N. Y. Supreme Ct. Rep.* 51; *Wharton on Negligence*, § 637). It is the duty of a street railway company to provide vehicles which insure security to their passengers, and not to suffer their passengers to occupy unsafe places upon the vehicles (East Saginaw, &c., R. Co. v. Bohn, 12 *Am. Law Reg.* 745).

V. The case is not one in which there was any question of contributory negligence (Johnson v. Hudson R. R. Co., 20 *N. Y.* 65; Willis v. L. I. R. R. Co., 34 *Id.* 670, 679). The death of the boy silenced the witness who could have given direct evidence of the negligence of the defendant, and the plaintiff was therefore entitled to the verdict of the jury upon such circumstantial evidence as could be offered. It is said in Gee v. R. R. Co. (8 *Q. B.* 161): "In considering what evidence is sufficient to call for an answer, I think that

Respondent's points.

you must look at the means the plaintiff has of proving more."

VI. At most, this question, if presented at all, should have been submitted to the jury as a question of fact (*Maugam v. Brooklyn R. Co.*, 38 *N. Y.* 458; *Downs v. N. Y. Central R. Co.*, 47 *Id.* 83).

VII. If the boy was in fact pushed off by the driver, then the defendant was liable, for no evidence was offered to show malice or willful misconduct on the part of the driver causing the injury to the boy. Malice or misconduct can not be presumed (*Wharton on Negligence*, § 128; *Higgins v. Watervliet Turnpike Co.*, 46 *N. Y.* 25; *Wharton on Negligence*, § 425).

VIII. The evidence offered by plaintiff of an offer by defendant to satisfy the claim, the subject of this action, before suit brought, was erroneously excluded. An exception was duly taken (*Ross v. Ackerman*, 46 *N. Y.* 210; *Green v. H. R. R. Co.*, 32 *Barb.* 34).

Ely & Smith, attorneys, and *Moses Ely*, of counsel for respondent, urged:—I. The mere statement of this case is enough to condemn an application for a new trial. It surely can require no argument to show that no course was left to the learned judge at trial term but to grant the nonsuit asked.

II. The offer rejected was (briefly) to prove that the president of defendants sought and had an interview with plaintiff, and offered her money in settlement, and neither admitted nor denied the liability of his company; and the rejection was proper. (a.) Such was not an admission of any fact by the president. (b.) There was no offer to prove, nor will it be presumed, that it could have been proved, that even an express admission by the president that his company was to blame would bind defendants. Such an admission can hardly be supposed to be within the scope of his agency for the company (*First National Bank v. Ocean*

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National Bank (in court of appeals). See *Daily Register*, of April 12, 1875.

BY THE COURT.—CURTIS, J.—The pleadings concede that it was the defendant's duty, as a common carrier, to receive passengers and deliver them at such points on its railroad as they should wish to enter or leave its cars. The deceased, a boy of twelve years of age, was a passenger in one of defendant's cars, occupying a seat in the front part of the car. The platforms and passage-way were crowded with passengers. The rear platform was so full no one could get on or off. At about Twentieth street the boy went towards the front of the car, and out upon the platform. When the car passed the lower corner of Nineteenth street and reached about the middle of the block, there was a break-up, as if breaks were being applied to the car, and when the corner of Eighteenth was almost reached, there was a jerk and an immediate stoppage of the car. The boy was found lying injured near the hind wheel of the car, his head not quite up to the upper Eighteenth street crossing. From this injury he died. There was snow on the side of the street from eighteen inches to three feet, which had been swept from the track and down to which it slanted, and the boy was lying between the snow and the side of the car.

The only witness who testified as to seeing how the injury occurred said, that he saw him on the instant of his coming down; it was all a flash; that he was pushed off or fell off *nolens volens*; that he could not say whether he was pushed or fell; that it came to his mind that may-be he was not holding on and the shock of the car threw him; that so far as he knew he may have been jerked off, or pushed off; and that he did not know how it was done; that he saw the boy standing perfectly still, and that he made no motion as if going to jump from the car.

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This evidence fails to show that the boy's injury was caused by any act or neglect of the defendants, or of their servants. He may have been pushed off, or jerked off by their carelessness, or he may have accidentally slipped or fallen from the car as he was preparing to alight when it should stop, or he may have jumped from the car without making any motion as if going to do so. If bare probabilities are considered it is difficult to see what they tend to show, and in this case the circumstances proved are insufficient to establish negligence on the defendant's part after he came out on the platform. It does not appear that the movement of the car was unusual when the brakes were applied to stop it, as it approached Eighteenth street. If it had been left to the jury to find whether the injury occurred through the carelessness of defendant's servants, and they had found that it did so occur, there is no evidence in the case sufficiently direct or positive to sustain such a finding. There must be something more shown than a probability of defendants' negligence; there must be some element of moral certainty, and exclusion of reasonable doubt. Justice requires that it should be proved that defendants committed the wrong, before they can be adjudged liable.

It was the duty of the railroad company in carrying passengers, in view of their condition, age, sex, or infirmity to exercise care and judgment in receiving and delivering them. This is a part of the consideration they render for the fare paid by the passenger. If it is disregarded, and the passage-way and rear platform are crowded with passengers, the only mode of egress left is by the front platform, and that mode selected by the deceased seems to have been both natural and reasonable under the circumstances.

On the trial the counsel for the plaintiff offered to prove that the president of the defendants, after causing this accident to be investigated, sought and obtained

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an interview with the plaintiff; and thereat, before this action was commenced or contemplated, or counsel was consulted by the plaintiff, the said president endeavored to settle the matter with the plaintiff, and offered to pay the plaintiff a sum of money in settlement thereof, and did not then or since question or deny the liability of the defendant.

The counsel for the defendant objected to the introduction of any such evidence, the objection was sustained, and the plaintiff's counsel excepted.

The offer is not to prove that the president of the defendants admitted or denied their liability, even if he had the power to bind them by such admission. It is an offer to show that the president proposed to pay the plaintiff a sum of money, in the course of negotiations for a settlement of the plaintiff's claim. The court properly excluded it. It is the policy of the law to favor the settlement of variances and controversies. The welfare of the community is protected by it. The admission of this class of testimony, would tend to prevent compromises and settlements of differences (*Waldridge v. Kennison*, 1 *Esp. R.* 143; *Turner v. Railton*, 2 *Id.* 274; *Williams v. Thorp*, 8 *Cow.* 202; 1 *Green. Ev.* § 192).

The judgment appealed from, should be affirmed with costs.

SEDGWICK, J., concurred.

Statement of the Case.

**MOLSON'S BANK OF MONTREAL, PLAINTIFF AND
RESPONDENT, v. CHARLES N. HOWARD, IM-
PLEADED, DEFENDANT AND APPELLANT.**

I. BILL OF EXCHANGE.—PROMISE TO ACCEPT.

1. TELEGRAM.

1. R. S. part 2, chap. 4, title 2, § 8. A promise to accept under this section may be *transmitted by a telegram written and sent by the promissor.*

2. UNCONDITIONAL.—WHAT IS UNDER THE STATUTE.

1. *Time the bill is to run need not be specified—e. g. "To A—Will accept twenty-five gold or three thousand currency, on usual time, B," is an unconditional promise, the time of drafts drawn in previous transactions of the same kind between the parties being proved.*

II. MARSHALLING ASSETS.

1. Can not be marshalled in an action to which all persons who claim to, or may possibly, be interested in the marshalment are not parties.

a. SEMBLE.—One who discounts an acceptance can not be deprived of his recovery against the acceptors, because he holds collateral security from the drawer, and the state of the accounts between the acceptors and drawer is such, that if the acceptors pay the acceptance, the drawer will be indebted to them in a sum equal to a part, or the whole of, or exceeding the value of the collateral.

b. BONA-FIDE HOLDER FOR VALUE BEFORE MATURITY OF ACCEPTED BILL OF EXCHANGE is entitled to recover in a suit against the acceptor, without reference to the equities between the original parties.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal from an order denying a motion for a new trial and from a judgment.

The action was brought to charge the defendants as

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acceptors of a draft for three thousand dollars, upon a written promise to accept, under the statute. On April 8, 1874, at their banking house in Montreal, the plaintiffs, a Canada banking corporation, in their usual course of business, at the request and for the account of the drawers thereof, discounted a draft or bill of exchange bearing date on that day, and drawn by Niven & Co., at Montreal, on the defendants at New York, at thirty days after date, for three thousand dollars. The proceeds of such discount, two thousand six hundred and eight dollars and forty cents, gold, were passed to the credit of Niven & Co., in account, and were used by them (*pro tanto*) in retiring their own acceptance of defendant's draft for three thousand dollars, which matured on that day, and which was held by the plaintiffs as agents of the Mechanics' National Bank of New York, for collection. The money received by the plaintiffs, in payment of Niven & Co.'s acceptance, was at once remitted by plaintiffs to the said Mechanics' Bank. The plaintiffs discounted and cashed the draft in suit on the faith of defendants' telegram, the original whereof was subscribed by Howard, and transmitted by him over the line of the Atlantic and Pacific Telegraph Company, to Niven & Co., at Montreal.

The telegram was as follows :

"N. Y. April 8, 1874.

"To NIVEN & Co., Montreal, Ca. :

"Will accept twenty-five gold or three thousand currency on usual time. Nothing new.

"C. N. HOWARD & Co."

The defendants are commission merchants in the city of New York, and the draft in suit was drawn by Niven & Co., as one of a series of drafts against consignments of merchandise previously forwarded by them to the defendants for sale. The usual time at which such drafts were drawn was thirty days.

Respondent's points.

It also appeared on the trial that at the time of the non-acceptance of the draft on Howard & Co., the subject of this action, there stood to the credit of said Niven & Co. on the books of the bank, eight hundred and seventy-four dollars in gold, and that in fact the bank then held that amount of money to the credit of said Niven & Co., and upon receipt of notice as aforesaid, held said sum of eight hundred and seventy-four dollars as security for the payment of the draft, the subject of this action, and then and ever since had refused to pay over said sum to said Niven & Co., or said assignee, and that since the making of said draft, the said Niven & Co. had become bankrupt and insolvent, and had taken the benefit of the bankrupt laws in Canada.

Charles N. Howard, one of the defendants, testified that he thought defendants had about fifteen hundred dollars of the drawers' to apply upon this acceptance.

A verdict for three thousand one hundred and seventy-seven dollars and fifty-five cents, was rendered under the direction of the court.

From the judgment entered on such verdict, as well as from an order denying his motion for a new trial, the defendant Howard has appealed to the general term.

Sandford, Robinson & Woodruff, attorneys, and *Charles F. Sandford*, of counsel for respondent, on the points discussed by the court, urged:—I. Telegraphic authority to draw has been held by the court of appeals to be "an unconditional promise in writing to accept" (*Johnson v. Clark*, 39 *N. Y.* 216, 218). "Nor was it in the power of the defendants to revoke their promise after the plaintiffs had parted with their money on the faith of it."

II. The court properly directed a verdict for the full amount of the draft, and the defendants' exception to such ruling is untenable. (1.) The defendants in this action can not be permitted to set off, against their

Appellant's points.

liability to plaintiffs, a claim of Niven & Co., or of the assignee in bankruptcy of Niven & Co., against the plaintiffs, notwithstanding that the defendants, upon payment of their acceptance, may have a good cause of action against that firm (Smith v. Van Loan, 16 Wend. 659). It is the right of Niven & Co., or of their assignee, to have the fact of their indebtedness (if any) to defendants ascertained and determined in a suit to which they are, respectively, made parties. (2.) It is not pretended that the gold held by plaintiff, as collateral to the draft in suit, has been applied, *pro tanto*, in payment. That gold is still claimed by Niven & Co. and their assignee in bankruptcy, as due from the plaintiffs to them. Plaintiffs retain it, notwithstanding such claim, but merely as security for the payment of the draft in suit. The fact that plaintiffs claim to hold the gold as security by no means establishes their right so to do, and warrants no presumption of such right in favor of defendant. If, for any reason, Niven & Co. are not liable to plaintiffs as drawers, and there is no evidence tending to establish such liability, or if, under the bankrupt law of Canada, plaintiffs' title thereto can not be sustained, the gold may be recovered of plaintiffs, even though this court, in this suit to which Niven & Co. are not parties, shall decide that the defendant is entitled to be credited with its value. No amount of security, in the hands of the plaintiffs, received by them from drawers who are only contingently liable, can avail to prevent or diminish a recovery against acceptors primarily liable.

Tracy, Olmstead & Tracy, attorneys, and *C. E. Tracy*, of counsel for appellant, on the points discussed by the court, urged:—I. This evidence did not make out a case of an “unconditional promise in writing,” within the meaning of the statute, and defendants' motion for a nonsuit was improperly denied. The

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telegram did not specify the particulars of the draft to be drawn, neither amount in money, nor time, nor any standard by which the particulars could be determined (*Barns v. Rowland*, 40 *Barb.* 368).

II. The amount of gold in hands of plaintiff should, as claimed by defendant, have been first applied on the draft. The claim was disallowed, and the justice directed a verdict for the plaintiff for the full amount of its claim (*Ex parte Kendall*, 17 *Ves.* 520; *Dorr v. Shaw*, 4 *Johns. Ch.* 20; *Cheeseborough v. Millard*, 1 *Johns. Ch.* 412; *Evertson v. Booth*, 19 *Johns.* 486; *N. Y. Ferry Co. v. N. J. Co.*, *Hopk.* 460; *Purdy v. Doyle*, 1 *Paige*, 558, 560; *Maurice v. Bank of England Cases*, *Temp. Talbot*, 218; *Wilder v. Keeler*, 3 *Paige*, 171; *Averill v. Loucks*, 6 *Barb.* 470; *Cowperthwaite v. Sheffield*, 3 *N. Y.* 243; *Besley v. Lawrence*, 11 *Paige*, 581; *De Peyster v. Hildreth*, 2 *Barb. Ch.* 109; *Geller v. Hoyt*, 7 *How. P.* 265; *Ingalls v. Morgan*, 10 *N. Y.* 179; *Hadley v. Chapin*, 11 *Paige*, 245; *Chester v. Kingston Bank*, 17 *Barb.* 271; *Hawks v. Hincheliff*, *Id.* 492; *Marsh v. Oneida Central Bank*, 34 *Id.* 298; *Gihon v. Stanton*, 9 *N. Y.* 476).

BY THE COURT.—CURTIS, J.—The plaintiff, a bank in Montreal discounted the draft at the drawers' request in the ordinary course of business, paying them the face thereof, less interest and one eighth per cent. commission. The draft was drawn against consignments of produce by the drawers to the defendants for sale.

The defendants on April 8, 1874, telegraphed from New York to the drawers, Niven & Co., in Montreal, that they would accept three thousand currency on usual time. Their previous transactions of the same kind had been on thirty days' time. The draft in suit was so drawn. The telegram was an unconditional promise in writing to accept the bill before it was drawn, and it is by statute made an actual acceptance

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in favor of the party, who upon the faith thereof receives it for a valuable consideration (2 R. S. 768, § 8).

This telegram was produced and given to the plaintiff when the draft was discounted. The writing and sending of it by the defendants was proved on the trial. The statute requires the promise to be in writing, but is silent as to the mode of communicating it to the party cashing the draft upon the faith of it. When it is in writing and thus acted upon its mode of conveyance, whether by telegraph, mail, or otherwise affects no rights, and such effect must be given to it as manifest justice and the exigencies of commerce call for in this class of communications.

It appeared on the trial, by a stipulation on the part of the plaintiff, that when the defendants refused to accept the draft in suit, there stood to the credit of Niven & Co., on the books of the bank, eight hundred and seventy-four dollars, gold, and that, in fact, the bank then held that amount to the credit of Niven & Co., and upon receipt of notice of non-acceptance, *retained the gold so held, as security for the payment of the drafts*; that, since the making of said draft, Niven & Co. have become bankrupt and insolvent, and that plaintiffs have, ever since, refused to pay over said sum, either to them or to their assignee in bankruptcy.

The value of this with interest was admitted to be on the day of the trial one thousand and fifty-seven dollars and eighty-eight cents.

The defendants excepted to the ruling of the court disallowing their claim, that this amount of gold in the hands of the plaintiff should be first applied on the draft. The ground of this claim by the defendants was that this draft was an over-draft, and if accepted and paid by them, they would be subjected to loss. The amount of this deficiency is not very clearly shown. From the correspondence it appears that

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during the thirty days the draft had to run the defendants held and sold considerable amounts of produce that had been consigned to them by the drawers. The defendant Charles N. Howard alone testifies on this point. It is as follows :

"Q. On April 7, 1874, what was the state of the account or of the transactions between Niven & Co. and Howard & Co.?

"A. They had made shipments and drawn drafts against us, and on March 7, or early in March, they made some drafts on shipments which we thought excessive.

"Q. At the time of those drafts, had you any funds?

"A. We had goods that were not realized upon ; as afterwards these goods were realized upon.

"Q. What would they net in your hands?

"A. They would be worth nearly one-half of what this draft would be at the time ; I have not the figures exactly in my mind that were to the credit of Niven & Co.

"Q. Had you any previous acceptances?

"A. We had ; the result shows that we had something to apply on this draft ; after we got through the accepted drafts, we had something to his credit ; on March 7, he made a draft, and I declined to accept it ; but he said he would make further shipments, and I accepted them ; but on the 16th, not getting the account, I made a draft on him for three thousand dollars, which it seems they used.

"Q. How much did your house have against the acceptances?

"A. I can not tell ; I think about one thousand five hundred dollars, as against these acceptances ; as soon as they got notice that I declined to accept, they stopped his account and reserved this amount, and they claim it to apply on this draft."

This defendant has a supposition that his house had

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about fifteen hundred dollars against the acceptances, but as he does not or can not tell what funds or goods of the drawees they had, and says that he can not tell how much his house had against the acceptances, it is not worth while to speculate as to what was the condition of the account, when the only party to it before the court does not know and can not state it with any reasonable certainty.

But even supposing there was evidence showing that Niven & Co. were at that time indebted to the defendant, and what was the amount of it, there would still be a difficulty in this form of action, in which Niven & Co. are not parties, in undertaking to pass upon their account with the defendants, or adjudicate in respect to it in any way. Niven & Co. have a right to be heard before such action can be taken. This court would have to assume, in their absence, that they owed the defendants at least the amount of the value of the gold, and then to hold that this fact entitled the defendants to be credited with the value of the gold, so belonging to Niven & Co. or their assignee in bankruptcy, and upon which the plaintiff claims a lien.

The cases of *Door v. Shaw* (4 *Johns. Ch.* 20); *Cheeseborough v. Millard* (1 *Id.* 412); *N. Y. Ferry Co. v. N. J. Co.* (*Hopk.* 460), and others cited on the part of the defendants are in support of the doctrine presented by Lord ELDON in *Ex parte Kendall*, (17 *Ves.* 520), to the effect, that if A has a right to go upon two funds and B upon one, having both the same debtor, and the funds are the property of the same person, A shall take payment from that fund to which he can resort exclusively, so that both may be paid. But it must be observed that in all these cases, all the parties in interest were brought before the court. All the facts bearing upon the rights of each were allowed to be presented, and as in *Averill v. Loucks* (6 *Barb.* 480), the

court would not pass upon questions where this had not been done. Where parties go into equity for an administration of accounts, and securities, and liens, and to be substituted in the place of those holding collaterals, on such terms as may be adjudged equitable, the rights of all parties may be protected. But this is very different from the present case.

If Niven & Co. or their assignee in bankruptcy had consented to the application of the gold to the payment of the draft in suit, it would apparently have inured to the defendants' benefit, but it appears to be otherwise, and if the plaintiff can not hold it, as against the assignee under the bankrupt law of Canada, it might have to pay it again, though this court in this case where Niven & Co. are not parties, should hold that the defendant is entitled to be credited with its value.

It is desirable to avoid all such complications, and to embarrass the machinery of mercantile transactions with the fewest possible restrictions.

There seems to be no good reason why a plaintiff, discounting an acceptance because he received collateral security from the drawers, who are only contingently liable, should be deprived of his recovery against the acceptors, who are primarily liable, because of the state of the accounts between the acceptor and the drawer. The holder *bona fide* and for value of an acceptance before maturity in a suit against the acceptor is entitled to recover from the acceptor, without reference to equities between the original parties (Smith v. Van Sloan, 15 Wend. 659; Gihon v. Stanton, 9 N. Y. 476; Marsh v. Oneida Bank 34 Barb. 298; Schepp v. Carpenter, 51 N. Y. 602; Johnson v. Clark, 12 Id. 218).

There was no question at the trial to submit to the jury, and the court properly directed the jury to find a verdict for the plaintiff.

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The judgment and order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

LOUISE DOUAI WEHLE, PLAINTIFF AND RESPONDENT, v. WILLIAM C. CONNOR, SHERIFF, DEFENDANT AND APPELLANT.

I. AMENDMENT TO ANSWER—BY SETTING UP MATTER ALLEGED TO CONSTITUTE A FURTHER DEFENSE.

1. MOTION FOR—WHAT MAY BE CONSIDERED UPON.

1. *Whether the matter constitutes a defense or counterclaim.*

a. If it does not, the motion may be denied, and the order of denial will not be reversed on appeal.

II. SHERIFF.

1. EXECUTION, NON-RETURN OF, ACTION FOR.

1. *What will not constitute a defense.*

a. The facts; that warrants of attachment had been issued to, and were then held by the sheriff against the property of the judgment creditor: that he had served copies thereof on the judgment debtor, with a notice that he levied upon and attached all goods, chattels, and credits in his hands belonging to the judgment creditor, and upon all debts due the judgment creditor from the judgment debtor, and that he had received from the judgment debtor a certificate under the warrant that he was indebted to the judgment creditor in the amount of the judgment, and that such judgment remained in full force and effect; will not constitute a defense.

1. EXCUSE FOR SHERIFF.—SEMPLE —If the court sees fit to stay the proceedings or to direct that the money be retained in the sheriff's hands after he had collected the amount out of the property attached, or to order it to be paid into court, an excuse may arise for a sheriff omitting to execute and return the execution.

Statement of the Case.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal from an order denying defendant's motion for leave to interpose the portion of the proposed amended answer entitled "second defense," on the ground that such portion does not constitute a defense.

The action is brought against the sheriff to recover damages for the non-return of three executions in favor of the plaintiff. More than twenty days after answering, the sheriff moved for leave to amend his answer, and set up a second defense. This motion was denied on the ground that the proposed amendment failed to constitute any defense or counter-claim, and the defendant appealed. The proposed "second defense" of the amended answer, which is disallowed by the order appealed from, alleges that the execution debtors in an action commenced by them against this plaintiff, and other parties in two several actions commenced by them against this plaintiff, on November 19, 1874 (six weeks after the issuing of executions), caused warrants of attachment under the Code to be issued against the property of the plaintiff in this action to the defendant, as such sheriff, copies of which the defendant alleges were served upon the judgment debtors, with a notice endorsed thereon, that he levied upon and attached all goods, chattels, and credits in their hands belonging to said plaintiff, and upon all debts due her from them, and that said sheriff "thereafter" received from them a certificate under each warrant, showing that they were indebted to the plaintiff in the amount of the three judgments, upon which he had the executions, and that said judgments, and each of them, then remained in full force and effect.

Brown, Hall & Vanderpoel, attorneys, and Almon

Appellant's points.

Goodwin and *A. J. Vanderpoel*, of counsel for appellant, urged:—I. The attachments received by the sheriff against the property of the plaintiff, and served by him upon the judgment debtors, were properly served, and became thereby a lien upon all moneys collected, or to be collected by the sheriff upon the judgments, and are *pro tanto* a defense to this action. (1) *a.* It is not necessary to question the proposition that when a sheriff receives money in payment of an execution in favor of a judgment creditor, he can not levy on the money so in his hands on an execution against such creditor. That is the rule as laid down in *Turner v. Fendall* (1 *Cranch*, 41); *Baker v. Kenworth* (41 *N. Y.* 215), and other cases cited by the plaintiff in the argument below. Those cases hold that money in the hands of the sheriff, under such circumstances, is not the property of the plaintiff, and his interest in it is merely a chose in action. Under an execution, choses in action are not subject to levy (*Ingalls v. Lord*, 1 *Cowen*, 240; *Ransom v. Miner*, 3 *Sandf.* 692). *b.* The case at bar is distinguishable from all the cases relied upon as supporting the plaintiff's position, in the fact that the processes issued to the sheriff against the judgment creditor, and under which he seeks to defend, are warrants of attachment. Under attachments, choses in action may be levied upon in the manner prescribed by the Code, and as was actually done in the present case (*Code*, §§ 232, 234, and 235). *c.* The proposed defense sets up, not that the sheriff has undertaken to attach moneys in his own hands, but debts due to the party against whom the attachments are issued, and there can be no question that under the certificates set forth in the answer such attachments have acquired a perfect lien as against the parties giving the certificate. (2) *a.* There is another very marked distinction also to be considered. The reasoning of the court in *Turner v. Fendall* (*supra*, p. 48), upon which all the later cases

Appellant's points.

depend is, that "the sheriff, not having brought the money into court, but having levied an execution while in his hands, has not sufficiently justified the non-payment of it to the creditor;" and further, that "if the payment of damages should be against equity, that was not a subject for the consideration of the court of law which rendered the judgment." The principle of these decisions, we submit, is that it is not the duty, nor is it the privilege of the sheriff to decide upon the equities or rights of the parties in such cases. *b.* Now, where an execution against the judgment creditor is in the hands of the sheriff at the same time that he has money in his hands, made on an execution in favor of such creditor, the rights of all the parties may be properly determined under the provisions of § 294 of the Code (Baker v. Kenworthy, 41 N. Y. 215). *c.* But under an attachment the sheriff is not called upon nor has he any right to turn over what has been paid or realized upon an attachment. The command of the writ is "to attach and safely keep" sufficient property of the defendant until the further order of the court, by judgment or otherwise. The plaintiff issuing the attachment can take no step under section 294 of the Code until judgment has been obtained, and is left without any remedy whatever, unless the lien of his attachment is preserved.

II. While *prima facie* the measure of damages in an action for non-return is the amount of the execution; this may be reduced by showing that the judgment debtor had no property out of which the execution could have been made, or by showing that the interest of the plaintiff in the execution is less than the face thereof. (1) Anything which attacks the judgment or the plaintiff's interest in it is a defense to the sheriff in such cases, *e. g.*, that the plaintiff has heretofore assigned the judgment. (2) In the present case the law has stepped in and made an assignment of

Respondent's points.

the plaintiff's interest in these judgments to the extent of these attachments, the amount of which is at present undetermined—an assignment subject, of course, to be set aside by the ultimate defeat of the plaintiffs in those attachments. (3) The cases in which it is said that the only defense the sheriff can set up in an action for non-return is that the judgment debtor has no property, viz., *Ledyard v. Jones* (7 *N. Y.* 550); *Bowman v. Cornell* (39 *Barb.* 69), are cases in which there was no dispute as to the validity or amount of the judgments or of the executions issued upon them.

III. Under the Code, a partial defense may be pleaded, such as facts in mitigation of damages, part payment, etc., and the proposed defense comes within this class (*Bush v. Prosser*, 11 *N. Y.* 347; *Loosey v. Orser*, 4 *Bosw.* 391; *Foland v. Johnson*, 16 *Abb.* 235; *Hynd v. Griswold*, 4 *How.* 69; *Williams v. Hayes*, 5 *Id.* 470; *Houghton v. Townsend*, 8 *Id.* 441).

IV. If the right of the defendant to interpose the proposed defense in this case be doubtful, it should be allowed, so that the question may be properly disposed of by the court of appeals, and that can not be properly done under an appeal from this order.

Charles Wehle, attorney and of counsel for respondent, urged:—I. As between the sheriff and the execution debtor there was nothing due from the latter to the plaintiff in this action if the sheriff had made the levy required by law. If however, he failed to make the levy, it is his own negligence, which caused damage to the plaintiff, and hence it can not be pleaded by him as a defense.

II. If the sheriff had done his duty by making the levy immediately upon the receipt of the execution, the title to the property levied upon by him, or the proceeds of its sale (if sold), would have immediately vested in the plaintiff, and the service of the attach-

Respondent's points.

ment, issued six weeks afterwards, could not have affected her title to that property or money ; hence the proposed second defense is founded upon the theory that the sheriff has failed to do his duty, and the court was correct in excluding it (Roth v. Wells, 29 N. Y. 489 ; Swezey v. Lott, 21 Id. 481 ; Hewland v. Willets, 9 Id. 173. See also Hathaway v. Howell, 54 Id. 97).

III. A result of the levy of an execution upon property is, that when once taken by a sheriff or other officer, who is the bailee of the law, property is then in *custodia legis*, and can not be interfered with by a private person, or by another officer acting under the authority of a different court or jurisdiction. They are in the custody of the law until the proper time for their sale, and for a reasonable time thereafter. During this time they are beyond the reach of seizure by any other execution, attachment or other writ, even for taxes, though they remain in the possession of the very party who is liable to pay taxes. The possession of the officer is the possession of the court by whose command that officer seizes them, and that possession can not be interfered with by any other court (Van Loane v. Kline, 10 Johns. 135 ; Hartwell v. Biswell, 17 Id. 128 ; Dubois v. Hartcourt, 20 Wend. 41 ; Pullian v. Osborne, 17 How. [U. S.] 471 ; Freeman v. How, 24 Id. 450 ; Herman on Ex. § 173). Hence the proposed defense is irrelevant, and was rightly overruled and excluded.

IV. Money collected on execution not being liable to levy, an officer, who applies such money in satisfaction of an execution in favor of a creditor of the execution plaintiff, is liable for the same to such execution plaintiff. If the sheriff has collected the money on these executions, such money does not become the goods and chattels of the plaintiff until paid out to her, and while it remains in the hands of the sheriff he could not apply it to the satisfaction of another execution against the former plaintiff, and consequently it

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can not be attached under the Code, as the attachment is merely a security for the execution to be issued upon the judgments (*Baker v. Kenworthy*, 41 *N. Y.* 215; *Muscott v. Woodwarth*, 14 *How.* 477; *Carroll v. Cone*, 40 *Barb.* 220; *Code*, §§ 232 and 237).

V. There is no excuse shown in the excluded portion of the answer why the sheriff has not returned the execution within the time required by law; no inability to collect, or insolvency of the defendants in the execution is averred, nor can it be pretended that the attachments operated as a stay (*Crocker on Sheriffs*, § 442; *Code*, § 230; 2 *R. S. Elm. Ed.* 458; *Code*, § 149; *Swezey v. Lott*, 21 *N. Y.* 481; *Bowman v. Cornell*, 39 *Barb.* 69; *Humphrey v. Hathorn*, 24 *Id.* 278; *Ledyard v. Jones*, 7 *N. Y.* 550).

VI. Assuming the warrants of attachments to have been issued and levied in good faith, yet if the sheriff had made return of the executions within the time required by law, the plaintiff in this action, by bonding the attachments at any time after appearance, would have been entitled to receive the money made on the executions, which can not be done now by reason of the sheriff's failure to return (see *Code*, §§ 240, 241; *Hathaway v. Howell*, 54 *N. Y.* 97).

BY THE COURT.—CURTIS, J.—The following provision of the statute points out concisely and clearly the duty of a sheriff in regard to the execution of process, and his liability for its violation:

“Every sheriff or other officer, to whom any process shall be delivered, shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him. For any violation of this provision, such sheriff or other officer shall be liable to an action at the suit of the party aggrieved, for the damages sustained by him, in addition to any other fine, punish-

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ment, or proceedings, which may be authorized by law" (2 R. S. 440, § 77).

By this statute an action is given to the creditor against the sheriff for not returning the execution. By this omission it is settled, that the sheriff becomes liable for the debt, unless he shows some sufficient reason, but he may show in mitigation of damages, that the defendant had no property on which the execution could be levied (*Swezey v. Lott*, 21 N. Y. 484).

It is to be considered whether the proposed defense is a sufficient excuse for the sheriff. It is the duty of the sheriff with an execution to execute the process in the most effectual manner. As an agent he is bound to proceed with that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs (*Tomlinson v. Rowe*, *Hill & Den. Sup.* 410). There is no reason assigned by the sheriff for delaying a levy under the executions for forty-two days after he received them. As an excuse for his subsequent omission to levy and return them, he sets up the warrants of attachment then issued. The law looks with disfavor upon delays and want of good faith on the part of officers charged with the execution of process.

The provision of the statute above cited, is but the affirmance and amplification of the rule as to their liability that had grown up at common law. But supposing it to be the case that these attachments had not originated directly or collusively from the execution debtors, but that they were issued while the sheriff was proceeding to levy under the executions, with the ordinary diligence of a man engaged in collecting his own debt, would they furnish a sufficient reason why the sheriff should desist from proceeding further with the executions.

It is clear that the goods of those defendants, as against themselves, were bound from the time of the

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delivery of the executions to the sheriff to be executed (2 R. S. 365, § 13; Roth v. Wills, 29 N. Y. 489). The law does not contemplate that the execution debtors can discharge this lien of the executions by suing out a warrant of attachment against their execution creditors, or that the sheriff is not to proceed under the executions because attachments may come into his hands and be levied on the debts due to the execution creditors. The duty of the sheriff is to proceed and make the money under the executions. There is no reason why he should not, and on the other hand his delay or his omission to proceed might lead to the loss of an opportunity to collect the debt from the execution debtor, and deprive both the execution creditors and the attaching creditors of any remedy.

The sheriff is simply the officer of the court charged with the execution of its process, and it is no part of his office to exercise a judicial discretion as to when, and under what circumstances, he will or will not execute it and make his return. Whether the attachments in the present case were properly issued or not, it was his duty to levy under the executions, and to collect them if possible, and pay to the plaintiff the amount, unless the court saw fit to stay the proceedings, or to direct that the money be retained in the sheriff's hands after he had collected the amount out of the property attached, or to order that it be paid into court. In some such way, an excuse may arise, for a sheriff omitting to comply with the provisions of the statute, but it is difficult to see how a sufficient excuse can arise from his undertaking, unauthorizedly and upon his own discretion, not to execute process (Paige v. Willett, 39 N. Y. 34, 35).

The order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

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FRANCIS W. HOLBROOK, RECEIVER, &c., PLAINTIFF AND APPELLANT, v. SOLOMON ORGLER, IMPEADED WITH HERMAN AHRENDORFF, DEFENDANT AND RESPONDENT.

HEAD-NOTE TO DECISION
OF

GENERAL TERM.

I. SUPPLEMENTARY PROCEEDINGS—CODE, §§ 294-298.

1. RECEIVER, NO POWER TO APPOINT.

a. In proceedings instituted under § 294 of the Code, after issue, *but before return of execution*, this court has no power to appoint a receiver. *

1. § 298 does not give power in such a case.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

HEAD NOTE TO DECISION.
OF

SPECIAL TERM.

J. SUPPLEMENTARY PROCEEDINGS.

1. MARINE COURT—POWER OF.

1. The marine court and its judge, have, in respect to judgments recovered in that court, all the powers and authority enumerated in and conferred by chapter 2, title 9, part 2 of the Code (supplementary proceedings). †

a. *Transcript, filing of*—This does not divest or affect such powers and authority. †

Before MONELL, Ch. J.

* This is an affirmance of one of the propositions held at special term.

The principle of the decision includes as well proceedings instituted under that section, *after return of execution*. The facts, however, do not call for so broad a decision, but only for one to the effect stated in the head-note.

† Neither of these propositions was passed on by the general term.

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Appeal from a judgment dismissing the complaint.

On July 21, 1874, John Pullman and Samuel C. Pullman recovered in the marine court of the city of New York, a judgment in their favor against said Herman Ahrens Dorf for the sum of two hundred and eighteen dollars and thirty-two cents, and filed and docketed a transcript of said judgment in the office of the clerk of the city and county of New York, where said Ahrens Dorf then resided, and issued an execution against the property of said Ahrens Dorf to the sheriff of the city and county of New York, where said Ahrens Dorf then resided, directing him to levy and collect the amount of said judgment, with interest from July 21, 1874, beside his fees.

Before the return of this execution, one of the justices of the marine court made an order dated July 31, 1874, in proceedings supplementary to execution, pursuant to § 294 and § 298 of the Code of Procedure, whereby the plaintiff was appointed receiver of all the property, debts, equitable interests, rights, and choses in action of said Herman Ahrens Dorf. The execution which had been issued was not returned until September 17, 1874. The plaintiff herein brought this action as such receiver.

Issue was joined by answer of defendant Orgler to the complaint, and was tried before a single judge at special term.

On the trial, defendant Orgler, among other things, claimed that plaintiff could not sustain his action because (1) the marine court had no power to appoint a receiver; (2) plaintiff's appointment as receiver under § 294, the execution not having been returned, and the judgment debtor being no party to it, was invalid.

The court at special term dismissed the complaint on the second ground, holding the first to be untenable.

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The following opinion was delivered :

MONELL, Ch. J.—“The power of a justice of the marine court to make an order for the examination of a judgment debtor, and in that proceeding to appoint a receiver of the debtor's property, must depend upon the construction and force to be given to the 7th section of the act of 1874, entitled ‘An act in relation to the marine court of the city of New York’ (*Laws*, 1874, chap. 545).

“Previous to the passing of that statute, there was no such power.

“The section referred to provides that, ‘In all cases where judgments shall be recovered in said court, all proceedings supplementary to execution on said judgments, under the provisions of the Code, if had in the city of New York, shall be had and completed in the said marine court, in the same manner and with like effect, in every particular, as now allowed by law in other courts of record, and all provisions of law relating to such proceedings shall apply to said marine court as fully as they now apply to any other court of record.’

“Under that statute the marine court may entertain these supplementary proceedings, unless deprived of jurisdiction by the effect of filing a transcript of the judgment in the county clerk's office.

“The 68th section of the Code, which was made applicable to the marine court, provided that, upon filing a transcript with the clerk of the county, the judgment shall be ‘enforced in the same manner, and be deemed a judgment of the court of common pleas.’

“That section was also made applicable to justices’ and other inferior courts of cities, not of record.

“The marine court at that time was not a court of record, except for certain purposes (*Huff v. Knapp*, 5 N. Y. 65; *Porter v. Bronson*, 29 How. Pr. 292), but

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by the act of 1872 (*Laws*, 1872, chap. 629), it is declared to be a court of record for all purposes. That act also provides that the judgments of the court docketed with the county clerk, shall have the same effect as a lien, and be enforced in the same manner as the judgments of the court of common pleas. It will be seen that the words, 'and be deemed a judgment of the court of common pleas,' are omitted; and the repealing clause of 'all acts and parts of acts inconsistent with this act,' is an express repeal of the 68th section of the Code as respects the marine court.

"The act of 1874 is still broader. Section 12 provides that the judgments of the court may be docketed with the county clerk, and shall thereupon have the same effect as a lien, 'and be enforced in the said manner as any other judgment of said court,' thus changing it from 'the same manner as judgments of the court of common pleas,' and leaving it with the marine court to execute its own judgments in all cases.

"This change in the statute was not noticed in matter of Lippman (*Daily Register*, January 13, 1875), nor was it necessary that it should be, as the judgment in that case had not been docketed with the county clerk.

"It is quite clear, therefore, I think, that under the last statute, the marine court is given power to execute its own judgments in the same manner that other courts of record may do; and whether docketed with the county clerk or otherwise, an execution may issue from such court, and no longer need be issued, as is understood to have been the former practice, out of the court of common pleas.

"The Code regulating proceedings supplementary to an execution, has been held to apply to justices' judgments which had been docketed in the county clerk's office, which covered the judgments of the marine court which had been docketed in like manner; and

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the officer authorized to make the order was a judge of the court of common pleas. When the section of the Code was enacted, and down to the act of 1874, the marine court judgments, after docket in the county clerk's office, were in effect judgments of the common pleas, and the judges of that court had exclusive jurisdiction.

"But as it was competent for the legislature to relieve the marine court from the operation of the 68th section of the Code, and give it control over its judgments, in respect to the manner of executing and enforcing them, it was equally competent to extend its jurisdiction to these supplementary proceedings.

"This has been done, and the marine court, under the act of 1874, is given the same power over its judgments and the manner of executing them, as is possessed by other courts of record; and the only effect of docketing in the county clerk's office is to make the judgment a lien on real property, as provided in section 282 of the Code in respect to the judgments of other courts.

"Another objection is, that the court can not appoint a receiver until after the return of the execution unsatisfied.

"The 294th section allows the examination of a third person alleged to have property of the debtor, before the return of the execution; and the authority to appoint a receiver is given by the 298th section. The 299th section provides that if the person examined claims an interest in the property adverse to the judgment debtor, such interest shall be recoverable only in an action against such person by the receiver.

"There are several decisions affecting this question.

"In *Kemp v. Harding* (4 *How. Pr.* 178) the appointment of receiver was made upon an examination under section 294, but without notice to the debtor, who appealed from the order, and the general term of the fifth

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judicial district held, that to authorize the appointment of a receiver in section 298 of the Code, the proceedings should be against the debtor to reach his property generally, and not, under the 294th section, of third persons as to property of the debtor in their hands, and that without such personal proceeding against a debtor, a receiver could not be appointed. That case has been approved in *Baker v. Johnson* (4 *Abb.* 437), where it was held that a receiver, appointed without an order for the examination of the judgment debtor, could have no authority to sue. And in *Sherwood v. Buffalo, &c. R. R. Co.* (12 *How. Pr.* 136), it is said, the proceeding under section 294 is merely in aid of the principal proceeding against the judgment debtor, and must be had in connection with it, and can not be resorted to independently of any proceeding against the debtor.

"In *Darrow v. Lee* (16 *Abb. Pr.* 215) it was held by the general term of the common pleas, that until the return unsatisfied of an execution, a receiver can in no case be appointed.

"In *Andrews v. Glenville Woollen Co.* (11 *Abb. N. S.* 78) it is held that 'section 294 does not authorize the appointment of a receiver, and that a receiver can not be appointed under section 298 of a particular debt or particular article of the debtor's property.'

"These are sufficient to show the current of decision setting strongly against the power to appoint a receiver, except upon an order for the examination of the judgment debtor; and I think they are sufficiently uniform to serve as a safe guide in determining the objection to the plaintiff's right to sue in this case.

"The proceeding supplementary to the execution is similar to, if not a substitute for, the late creditor's bill, which could not be filed until all legal efforts to collect the judgment had been exhausted. Hence, in all cases it was necessary to show that an execution

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upon the judgment had been issued and returned unsatisfied.

"So here, the remedies at law must be exhausted against the debtor's property, and then he may be proceeded against to make discovery of his property, and the other proceeding is merely ancillary to such principal proceeding.

"The want of power in the judge to appoint a receiver, upon an examination under section 294, is vital to the plaintiff's right to sue, and the objection is available by the defendant in this action.

"The defendant must have judgment, dismissing the complaint, with costs."

Judgment dismissing the complaint having been rendered, defendant Orgler appeals.

J. S. & C. H. Smith, attorneys, and of counsel for appellant.

D. & T. McMahon, attorneys, and *Dennis McMahon*, of counsel, for respondent.

BY THE COURT.—CURTIS, J.—The proposition contended for by the appellants is substantially this, that after issuing and before the return of an execution upon an affidavit that any person has property of the judgment debtor or is indebted to him in an amount exceeding ten dollars, a judge may appoint a receiver of all the property, debts, equitable interests, rights and choses in action of the judgment debtor, with all the powers of a receiver to take possession, hold and dispose of the same, precisely as though appointed under a creditor's bill, or in proceedings supplementary to execution after the return of an execution unsatisfied.

It might be harsh and oppressive, while, an execution is in the sheriff's hands that will be satisfied by a levy and sale, or by the efforts of the

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judgment debtor to meet it, that without waiting for the return of the process and simply upon the affidavit above referred to, a receiver with such powers should be appointed, and competent among other acts to subject the property of the judgment debtor to the burden and expenses of a great variety of litigations. The jurisdiction of the court of chancery in reference to creditors' bills, defined and confirmed by the Revised Statutes, was limited to those cases, where the execution had been returned unsatisfied. The creditor was compelled to exhaust his legal remedies, before resorting to a court of equity.

It may well be doubted whether the framers of the Code intended to change this rule. It is evident that they sought to simplify and abridge the former proceedings to obtain payment after the return of an execution unsatisfied; and if they had intended to establish the new remedy of appointing a receiver, and obtaining satisfaction prior to the return of the execution unsatisfied, it is but just to presume, that they would have used some language manifesting such intention. A careful examination of the provisions of the Code upon which the appellant bases this claim, fails to disclose any such language.

So far as this question has come before the courts for consideration, it seems to have been held, that there was no power to appoint a receiver, except when an order for the examination of a judgment debtor had been first obtained (*Weyman v. Childs*, 44 *Barb.* 403; *The Ocean National Bank v. Olcott*, 46 *N. Y.* 18; *Darrow v. Lee*, 16 *Abb. Pr.* 215; *Kemp v. Harding*, 4 *How. Pr.* 178; *Andrew v. The Glenville Woollen Mill*, 11 *Abb. N. S.* 82).

No order for the examination of the judgment debtor had been obtained in the present case, and consequently there was a want of power in the judge to appoint the receiver. He is therefore without legal capacity to act

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as such. The answer places his authority to so act in issue. The objection was available and duly taken by the defendant, and is one that is fatal to the plaintiff's capacity and right to sue. It becomes unnecessary to consider the remaining questions raised by the appeal.

The judgment appealed from, should be affirmed, with costs.

SEDGWICK, J., concurred.

JOSEPH U. FAGNAN, PLAINTIFF AND REPOENDENT,
v. CHARLES KNOX, DEFENDANT AND APPELLANT.

I. MALICIOUS PROSECUTION.

1. PROBABLE CAUSE.

(a). *Want of, when question of law.*

1. When the facts are undisputed, or found by a jury, it is a question of law whether such facts show a want of probable cause or not.

(b). *What facts show prima facie probable cause, when the prosecution complained of was a criminal one for embezzlement.*

1. That the books kept by plaintiff in the course of his employment as book-keeper for the defendant, disclosed items entered in the petty cash book as drawn by him which were not posted in the general cash book, and also items entered in the general cash book, which were not posted in the ledger, and also erasures in plaintiff's ledger account, true additions being erased and incorrect additions in plaintiff's favor substituted; that soon after plaintiff's attention was called to these matters, and payment demanded for what the books upon a statement prepared from them by another book-keeper showed to be due, he conveyed to defendant some real estate held by him, and his wife also conveyed to defendant some real estate belonging to her, which she refused to do until she

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was paid two hundred and fifty dollars, which was paid her; and that plaintiff admitted defendant's claim to be correct; are sufficient facts to establish such *prima facie* probable cause.

(c). *What facts will rebut such prima facie case of probable cause.*

1. That plaintiff kept a memorandum-book in which he entered sums of money that he occasionally loaned to defendant, which book would explain the alleged improper credits he had given himself in his ledger account, and the apparent errors and discrepancies in the books of defendant kept by him, in a way consistent with his innocence of the charge of embezzlement; that prior to defendant's complaint charging him with embezzlement, he explained to defendant that this book would show the amount loaned to him (defendant) by him (the plaintiff), and which he deducted from the ledger when he made out his cash account; that defendant asked to see the book; plaintiff allowed him to take it, and he carried it away with him, and ever afterwards denied having it or having seen it; are sufficient facts to rebut such *prima facie* case of probable cause.

So too: the facts that prior to the setting on foot the prosecution for embezzlement, plaintiff offered to explain with such memorandum-book, such alleged improper credits, and apparent errors and discrepancies, and that such book would so explain them, establish the want of probable cause.

2. DISBELIEF IN THE CHARGE ON WHICH THE PROSECUTION WAS FOUNDED.

(a). *Evidence of, competent.*

1. It is competent as bearing both on the question of want of probable cause and on that of malice.

(b). *Facts tending to show such disbelief.*

1. The fact that defendant prior to the complaint against the plaintiff charging him with embezzlement settled with him for the money, afterward claimed to have been embezzled, as and for a debt on contract, express or implied would tend to show such disbelief.

3. MALICE.

(a). *Implied, as a general principle, from want of probable cause.*

(b). *Deprivation of means of exculpation.*

1. If the defendant deprives the plaintiff of his means of

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exculpation, and then prosecutes him criminally,—*such acts are on their face malicious.*

4. DAMAGES.

(a). *Indemnity is awarded for all the injury to reputation, feelings, health, mind and person caused by the arrest including the expenses of the defense.*

(b). *Facts bearing on the question of damages.*

1. The pre-existing business relations of the parties, conveyances from plaintiff and his wife to defendant and a general release from defendant to plaintiff executed after the making of the charge and before the arrest, the circumstances surrounding the execution of such instruments, the impaired health, and reduced circumstances and impoverishment of the plaintiff after his arrest, the appearance of defendant before two grand juries, are all facts bearing on the question of damages, and evidence respecting them is admissible.

5. EVIDENCE.

(a). *Health of body and mind.*

1. *Witness as to, competency of.*

(a). *Laymen may state acts they have observed, and may sometimes give their impressions formed at the time as to whether the acts so observed were rational or irrational. The case at bar does not call for the strict application of the rules pertinent to an inquiry as to whether a person is non compos mentis or of testamentary capacity.*

II. WITNESS, EXAMINATION OF.

1. *Answers irresponsible to the questions.*

(a). *The party deeming them prejudicial must move to strike them out.*

2. *Questions improper.*

(a). *Overruling an objection to them does not constitute cause for reversal where the answer was proper and competent evidence.*

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal by the defendant from an order denying a motion for a new trial and from a judgment.

The facts sufficiently appear in the opinion.

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John M. Scribner, Jr., for appellant.

Townsend & Weed, and *John D. Townsend*, for respondent.

BY THE COURT.—CURTIS, J.—In order to maintain this action, it devolves upon the plaintiff to establish that there was a want of probable cause for the criminal prosecution of which he complains, and that this prosecution on the part of the defendant was malicious.

When the facts are undisputed, or when they fail to show a want of probable cause, a question of law arises, which it comes within the province of the court to decide. But when there is conflicting evidence as to the matters insisted upon as constituting a want of probable cause, and the facts are in dispute, then it is for the jury to determine what the facts are. Whether the facts found to exist constitute probable cause is still an abstract question of law to be determined by the court (*Weaver v. Townsend*, 14 *Wend.* 192; *Bulkeley v. Keteltas*, 6 *N. Y.* 387).

The defendant to show at the trial that there was a probable cause for his prosecution of the plaintiff, proved that the books kept by the plaintiff in the course of his employment as book-keeper for the defendant, disclosed that there were items to the amount of several hundred dollars entered in the petty cash book as drawn by him which were not posted by him in the general cash book, and also items amounting to several hundred dollars entered in the general cash book, which were not posted by him to his account in the ledger. There were also erasures in the ledger in the plaintiff's account, true additions having been erased and incorrect additions, in the plaintiff's favor, inserted in their place. It was also shown that soon after the defendant's calling the plaintiff's attention to these matters and demanding payment for what the

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books upon a statement prepared from them by another book-keeper employed by the defendant for that purpose showed to be due, the plaintiff conveyed a house and lot in Brooklyn belonging to him to the defendant, and the plaintiff's wife also conveyed a house and lot in Brooklyn, standing in her name, to the defendant, and a general release was given them by the defendant. The property thus conveyed appears to have been substantially all the means of the plaintiff and his wife. She refused to convey her house to the defendant, until he gave her a check for two hundred and fifty dollars, which he did, and which was paid. There was testimony that the plaintiff admitted that the statement of the defendant's claim was correct.

These facts establish *prima facie* probable cause for the criminal prosecution of the plaintiff by the defendant.

The plaintiff testified that he kept a memorandum-book, in which he entered sums of money that he occasionally loaned from his own drawings to the defendant, and that this memorandum-book completely explained the apparently improper credits he had given himself in his ledger account, by showing that the sums deducted from his account equalled those which this memorandum-book showed he had loaned the defendant. The plaintiff also testified that the defendant, the day after making the claim upon him, came to his house in Brooklyn, where he was ill in bed, and that he then explained to the defendant that this private memorandum-book would show the amounts loaned to him by the plaintiff, and which were deducted from the ledger when he made out his cash account, and that the defendant then asked to see this memorandum-book; that he allowed him to take it and the defendant carried it away with him, and ever afterwards denied having it, or having seen it. The defendant testified at the trial of the plaintiff before the criminal court,

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where the plaintiff was acquitted, that he never heard of this memorandum-book until it was spoken of at that trial.

The statement of the plaintiff that the defendant carried away the memorandum-book was corroborated by the evidence of his wife; Louis H. Dickerson, a member of the bar, testified, that he called with the plaintiff on the defendant three or four days after this interview, and that the plaintiff then stated to the defendant, that the book which he gave him the other day at his house would explain all, to which the defendant replied, "I know nothing about that." The statement of the plaintiff that he thus loaned money to the defendant at times is claimed by the plaintiff to be confirmed by the testimony of the defendant at the criminal trial, that the plaintiff had charge of all his money, and that when he wanted money for himself he asked the plaintiff for it.

It appeared that the plaintiff had more than twenty years previously entered the defendant's employment, as a general clerk or porter in his hat store; that he had remained with him continuously during that period, with one exception of a few months; that he at one time had a small interest in the profits of the business; and that their relations were close and confidential.

There was evidence that the plaintiff had not much knowledge of book-keeping. He testifies that when he showed the erasure and amount of loan of four hundred dollars, subtracted on the cash-book, and also his memorandum-book to the defendant, the latter said, "it was all right," and he did not, for this reason and the confidence that was existing between them, charge himself by independent entries.

The plaintiff testified that after the conveyances by him and his wife to the defendant, the latter on one occasion offered to give him a recommendation, if he would go to Philadelphia or Baltimore.

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The testimony shows that the plaintiff, at the time the defendant first made the claim, was in a feeble condition owing to illness, and tends to show that at no period has he been a very strong man intellectually.

The defendant denies having ever seen the memorandum-book testified to by the plaintiff, and states that his proposed recommendation was for only industry and sobriety. The clerks who were then in the defendant's employ also testify that they never saw or heard of this memorandum-book.

There was conflicting testimony as to the value of the property conveyed to the defendant, and as to whether it was in excess of the amount claimed by the defendant.

There was the testimony of some witnesses introduced, tending to impeach the defendant's general character for truth and veracity, but it was sustained by several other witnesses called on his behalf.

The criminal prosecution was commenced about two months after the conveyance of the houses to the defendant, and after the plaintiff had obtained a situation in another New York hat store, and a few days after an altercation by the defendant with the plaintiff's wife.

If the testimony on the part of the plaintiff was true, the plaintiff was not only innocent of the charge made against him by the defendant, but the defendant, when he proceeded against him criminally, knew it, and in addition to that, wrongfully withheld from him the memorandum-book that contained the explanation of the irregularities apparent upon the books.

It is also clear, if what the plaintiff claims to be the facts of the case are so found by the verdict of the jury, and rightfully so found, that there was not only a want of probable cause for the prosecution, but that

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the prosecution sprung from base motives, and was malicious.

The defendant moved to dismiss the complaint at the trial, on the ground that the defendant had probable cause for the prosecution of the plaintiff, and that there was no proof of any malice.

To the denial of this motion he excepted.

Upon the conflict of testimony in respect to this, questions of fact arose, which it would have been erroneous for the court to have taken from the jury.

These questions were very fairly and clearly submitted to the jury, and their finding was in favor of the plaintiff. It is in substance, that the prosecution was instituted maliciously, and without probable cause, and without the prosecutor's belief that the charge made by him was true.

Upon considering the evidence, it is impossible to sustain the claim of the defendant, that this verdict is against the evidence, and the weight of evidence, and wholly unsupported by the testimony. The evidence was conflicting, and it was exclusively for the jury to determine what was the truth. It is true, that public policy requires that a person prosecuting a criminal charge in good faith and upon reasonable grounds, should be protected from liability therefor; but when the prosecution is claimed to have been in bad faith, and groundless, and there is evidence introduced to that effect, upon which the jury so find, it neither accords with the law nor with public policy, that such a verdict should be lightly disturbed. It matters not how this conflicting evidence may have impressed the court; the jury are solely to determine what is the fact.

The defendant excepted to the charge of the judge, in instructing the jury that if they found that, prior to the complaint by the defendant charging the plaintiff with embezzlement, the plaintiff gave to the defendant

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a memorandum-book containing memoranda of sums of money paid to the defendant by the plaintiff, which would explain the apparent errors and discrepancies in the books of the defendant kept by the plaintiff, in a way consistent with plaintiff's innocence of the charge of embezzlement, then the defendant had no probable cause for charging the plaintiff with embezzlement.

It is claimed that, even if the defendant did receive such a book from the plaintiff, he was under no obligation to look at it.

Embezzlement is the fraudulent appropriating to one's own use, the money or goods entrusted to one's care and control by another. This very relation implies that the party so entrusted shall account with his principal. To hold that the principal may deprive the person he so entrusts of his means of accounting, and that he may shut his eyes and refuse to look at his explanation or to account with him, and proceed to prosecute criminally, would be a harsh rule to establish, and lead to oppressive abuses.

Neither can the defendant's exception to the part of the charge—where the jury were instructed that if the plaintiff offered to explain with this book, these same apparent errors and discrepancies, and the jury believed on the evidence such book would explain them, there was no probable cause for the prosecution—be sustained. The same views apply to this as to the preceding exception. It was as much the duty of the defendant to receive from the plaintiff, his clerk, his reasonable and sufficient explanation in respect to the matters entrusted to him, as it was the duty of the plaintiff to render such explanation. The law seeks to protect both in their respective relations, and neither are placed subject to the unreasoning or blind will of the other.

The remaining exceptions by the defendant to the

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judge's charge were to instructions that if they found that the defendant prior to the complaint against the plaintiff charging him with embezzlement, settled with the plaintiff for the moneys the defendant afterwards charged the plaintiff with having embezzled, as and for a debt on contract, expressed or implied, such fact would be evidence tending to show that the defendant did not believe the plaintiff had embezzled the moneys ; and that if they found that there was no probable cause for the arrest and indictment of the plaintiff, malice may be implied.

It is apparent, that if the defendant in the first place, and when the matter was fresh in his own mind, settled with the plaintiff as and for a contract debt, that such settlement would tend to show that the defendant did not believe the plaintiff was guilty of embezzlement. It is reasonable to infer that the defendant's conduct in that respect, was governed by his belief. It was proper for the court to submit it to the jury, as tending to show what was his belief. In the conflict of evidence it was a circumstance which the jury might properly consider and give it just weight.

As a general principle, where there is no probable cause for the prosecution, malice may be implied.

In the present case, if the defendant, as the jury found, wrongfully deprived the plaintiff of his means of exculpation, and then prosecuted him criminally, it would be on its face a malicious act, and such without resorting to any very delicate theory of malice by inference and implication to establish it (*Murray v. Long*, 1 *Wend.* 140 ; *Burhans v. Sandford*, 19 *Wend.* 417 ; 2 *Green. Ec.* § 453).

Several exceptions were taken by the defendant at the trial to the admission of evidence in reference to the original employment of the plaintiff by the defendant, the terms upon which it continued, the general release from the defendant to the plaintiff, the conveyances

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from the plaintiff and from his wife to the defendant, the impaired health and reduced circumstances and impoverishment of the plaintiff after his arrest, the appearances of the defendant before the two grand juries, and the indictment found by the last grand jury on which he was tried. It was claimed that all this was immaterial and calculated to prejudice the defendant with the jury.

The rule of damages in an action for a malicious prosecution is not a restricted one. Indemnity is awarded for all the injury to reputation, feelings, health, mind, and person caused by the arrest, including the expenses of the defense (*Sheldon v. Carpenter*, 4 *N. Y.* 579 ; 2 *Green. En.* § 456).

The plaintiff claims that he sustained injury in these respects, and that for the purpose of so injuring him the defendant preferred the criminal charge against him. The pre-existing business relations of the parties, the acts and motives of the defendant, and the injuries of the plaintiff, were material to the issues to be determined at the trial. There was no relaxation of the rules of evidence in these respects that was unjust to the defendant. The questions of probable cause and of his faith or malice in making the charge, were more or less to be determined from the occurrences disclosed by a complete history of what pertained to the transaction.

There seem to be no very stringent and artificial rules in regard to actions for malicious prosecution. It is held that the prosecution complained of must have been ended and determined in the plaintiff's favor. But when the oppression or fraud of the prosecutor prevent the plaintiff from making out his defense, this restriction ceases to be of effect (*Burt v. Place*, 4 *Wend.* 591).

The defendant claims that his exceptions taken during a very protracted trial, eighty in number, present

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manifest and manifold errors of law, which entitle him to a reversal of the judgment, and asks that the court consider them all. In doing this an embarrassment arises from the case not showing that any ground of objection was stated for very many of them. The most careful consideration of the evidence will not always enable an appellate court to divine what was the ground of objection where none is stated; and to reverse a judgment on grounds of objection not stated at the trial, where the difficulty might have been remedied, hardly accords with the due administration of justice. In support of the allegation in the complaint, that the charge against, and the arrest of, the plaintiff was published in several newspapers, notices in two newspapers were read at the trial, to which the defendant objected, stating no ground. If he had stated that the plaintiff had already proved the publication or that it was immaterial or any other ground of objection, directing the attention of the court to it, there might have arisen no occasion for an exception, or if there did, it would have been entitled to more consideration. The judge stated that he allowed the publication to be read, to show that notice had been taken in the public papers of the criminal charge against the plaintiff, though a good deal that was spread out in them was entirely immaterial. It does not appear that the contents of these notices tended to prejudice the defendant with the jury.

There were several exceptions taken by the defendant to evidence in reference to the present and former condition of the plaintiff as to health and social relations. The defendant introduced evidence tending to prove that the plaintiff's health was impaired by a chronic difficulty before his arrest, and urged that the plaintiff falsely attempted to induce the jury to believe that it was impaired by the arrest. The defendant's objections to this part of the testimony on the plaintiff's part were on the ground of incompetency, without

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specifically stating the ground upon which the testimony was incompetent. The investigation as to whether the plaintiff suffered from a depressed state of body and mind after the arrest, and if that state was occasioned by the arrest, is not necessarily one upon which experts are alone competent to speak. There are phases mental and physical of the human economy, concerning which persons of ordinary intellect are competent to testify. The present was not an inquiry as to whether the plaintiff was *compos mentis*, and did not call for the strict application of the rules pertinent to such an inquiry, or to the investigation of testamentary capacity. The impression of a layman formed at the time, as to whether the act he testifies he observed was rational or irrational, may sometimes be given in evidence (*Hewlett v. Wood*, 55 N. Y. 634).

The court ruled that these witnesses, laymen, could only state the acts the plaintiff performed, and that the jury could determine. When in answer to the question, "How did he act?" the witness volunteered statements irresponsible to the question, the defendant should have moved to strike them out, if he deemed them prejudicial. In the instance previous to the ruling of the court, where the form of the question embraced what was perhaps objectionable, it will be seen that the response was confined to what the witness observed.

The consideration of the numerous exceptions in this case, does not lead to the conclusion, that a reversal of this judgment is called for.

The judgment and order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

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JAMES PATTERSON, PLAINTIFF AND RESPONDENT, v. CHARLES S. STETTAUER, AND ANOTHER, DEFENDANTS AND APPELLANTS.

I. DEPOSITION TAKEN IN AN ACTION AGAINST CO-PARTNERS BEFORE ONE OF THE DEFENDANTS HAS APPEARED (WHO SUBSEQUENTLY APPEARED AND ANSWERED), BUT AFTER THE OTHERS HAD APPEARED AND ANSWERED,

Is admissible on the trial of the issues formed by the answers as against those who had appeared and answered at the time it was taken, and being so admissible must affect the one who had not then appeared to the same extent as it would have affected him as a partner of the others if he had not appeared at all.

1. A ruling to this effect is correct.

II. BILLS OF EXCHANGE—DRAFTS.

1. AUTHORITY TO DRAW, CONSTRUCTION OF.

An agreement by A to deliver to B goods from day to day for a period extending over several months, and by B to pay for such goods on the first day of each month in *drafts* drawn by A on B at twenty days' sight,

does not restrict

A to drawing on the first of each month but a *single draft* for all the goods delivered during the preceding month,

does not require, as a condition precedent,

to the obligation to pay that there should be a *demand* for the payments of such drafts.

2. DRAWN UNDER SUCH AN AGREEMENT AS ABOVE, GENERALLY ON THE VENDEE FOR PART PAYMENT OF GOODS DELIVERED.

1. *Effect of delivery by drawer to a third person, and re-delivery to drawer.*

a. DELIVERY DOES NOT OPERATE AS AN ASSIGNMENT *pro tanto* of what was due to the drawer under the contract, or of the drawer's rights and interests thereunder.

1. This ALTHOUGH the agreement provided that the drafts should be endorsed as correct by a person specified in the agreement, and the same were so endorsed.

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b. RE-DELIVERY would operate as a RE-ASSIGNMENT of what was originally transferred.

1. CAUSE OF ACTION. If the *delivery* operated to *divest* the drawer of any cause of action he then had, the *re-delivery* operated to *re-invest* him therewith.

3. PRESENTMENT FOR ACCEPTANCE.

1. *Evidence sufficient to sustain a finding of presentment.*

a. Proof of *repeated promises* by the drawees to pay the draft is sufficient; *it not appearing* that the promise was made under a mistake as to the fact, or from a benevolent motive or moral and not legal obligation.

1. This although the *drawees testify* that the draft was *not presented*.

III. GOODS SOLD AND DELIVERED—ACTION FOR.

1. SPECIAL CONTRACT FOR PAYMENT IN A PARTICULAR MODE DOES NOT INTERFERE WITH THE MAINTENANCE OF SUCH AN ACTION,—WHEN.

a. When the defendant, upon being duly and properly requested to make payment in the mode prescribed refuses so to do.

1. *Drafts* drawn as per special agreement by the vendor on the vendee for payment *do not interfere* with the maintenance of the action, *when*.

a. When the drawee refuses to either accept or pay the drafts, and at the commencement of the action they remain unpaid and unaccepted in the vendor's hands.

2. COMPLAINT, ALLEGATIONS IN.

1. *What do not necessarily interfere with the action being for goods sold and delivered, and make it one solely for damages for non-acceptance of drafts.*

a. When the complaint avers that defendant agreed with plaintiff in consideration of plaintiff's delivering to him certain goods to accept, honor, and pay the drafts of the plaintiff on him, for the value of such deliveries, provided such drafts were endorsed as correct by a person named in the agreement; that plaintiff in pursuance of such agreement delivered a large quantity of goods of the value of thirty thousand dollars, and drew on defendant five drafts amounting in the aggregate to eleven thousand six hundred and four dollars and twenty-five cents, which were endorsed as correct by the person named in the agreement, and were duly presented to the defendant for

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acceptance who refused to accept, honor, or pay the same; that plaintiff is the lawful owner and holder thereof; that by reason of defendant's failure to accept, honor, and pay said drafts, plaintiff has suffered damage in the sum of eleven thousand dollars; and prays judgment for damages in eleven thousand dollars;

1. IT STATES: *a cause of action on the contract for that part of the value of the goods delivered for which the drafts set forth in the complaint were drawn.*

2. THE AVERMENTS AS TO the drawing of the drafts, the presentment of them and the refusal to accept, honor, or pay, and the ownership of them, and the averment "by reason of the defendant's failure to accept, honor, and pay said drafts," *do not necessarily make the action one based solely on a cause of action for damages for refusal to accept.*

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal by defendants from judgment entered on report of referee.

The action was brought upon a contract made between plaintiffs and defendants, by which the plaintiffs promised to deliver to the government of the United States at the Bosque Rodondo Reservation, as many pounds of beef as might be called for by the government commissary. The defendants promised to pay the plaintiff therefor, six and one-half cents per pound for the beef so delivered and accepted by the commissary. The contract provided "payment to be made on the first day of each month, in drafts twenty days' sight on C. S. Stettauer & Co., 44 Hudson street, New York, said drafts to be endorsed by the commissary agent as correct."

The complaint was as follows:

"The plaintiff, by this his amended complaint, alleges:

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"That at the times hereinafter mentioned, the defendants above named, with one Perry Fuller, were co-partners in trade, and doing business in the city of New York, under the firm name of C. S. Stettauer & Co., and at the city of Washington, D. C., under the firm name of Perry Fuller & Co.

"That the defendants' partners in business, under the firm name of C. S. Stettauer & Co., at Las Vegas, New Mexico, on or about February 10, 1868, agreed with this plaintiff, in consideration of this plaintiff's furnishing and delivering at Fort Sumner, in the Territory of New Mexico, a quantity of beef for said firm, that said firm would accept, honor, and pay the drafts of this plaintiff upon them for the value of the said deliveries, provided said drafts so drawn by this plaintiff were, before presentation, endorsed by one W. Rosenthal, who was acting as the commissary for the Navajoe Indians, as correct.

"The plaintiff further shows that, in pursuance of said agreement, during the months of March, April, and May, 1868, he duly delivered a large quantity of beef of great value—to wit, of the value of thirty thousand dollars—at Fort Sumner, as required in and by said contract.

"This plaintiff further shows that at Fort Sumner, on April 23, 1868, in pursuance of said agreement, he drew upon the defendants four drafts, in the words and figures following :

[Here the complaint set out four drafts, amounting in the aggregate to eight thousand one hundred and thirty-four dollars and twenty-eight cents. And then proceeded :]

"The plaintiff further shows that each of said drafts was, before its presentation to the defendants, duly endorsed : 'Correct, W. Rosenthal, commissary Navajoe Indians,' and also by John J. Chisum, and was afterwards, to wit, on June 30, 1868, duly present-

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ed for acceptance to the said drawees named in said bills, but the said defendants refused to accept, honor, or pay the same or any part thereof.

"That this plaintiff was thereupon compelled to, and did, take up said drafts, and is now the lawful owner and holder thereof.

"This plaintiff further shows that, at Fort Sumner, on May 1, 1868, in pursuance of said agreement, he drew upon the defendants a further draft, in the words and figures following :

'\$3,505. 97.

'FORT SUMNER, N. M., May 1, 1868.

'Twenty days after sight pay to the order of myself three thousand five hundred and five $\frac{97}{100}$ dollars, value received, and charge the same to account of

'JAMES PATTERSON.

'No. 13.

'To C. S. STETTAUER & Co.,

45 Murray street, New York city.'

"The plaintiff further shows that the said draft was, before its presentation to the defendants, duly endorsed : 'Correct, W. Rosenthal, commissary Navajo Indians,' and also by this plaintiff ; and that the same was duly presented for acceptance to the defendants on May 14, 1868.

"That the defendants refused to accept, honor, or pay said draft, and that the plaintiff is now the lawful owner and holder thereof.

"The plaintiff further shows that by reason of the failure of the defendants to accept, honor, and pay said drafts, this plaintiff has suffered damage in the sum of eleven thousand six hundred and forty $\frac{24}{100}$ dollars, with interest from May 23, 1868. That afterwards, and on or about January 3, 1871, the said Perry Fuller departed this life, leaving the above-named defendants the surviving partners of the said firm of C. S. Stettauer & Co. and Perry Fuller & Co.

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“Wherefore plaintiff demands judgment against the said defendants for damages in the sum of eleven thousand six hundred and forty $\frac{25}{100}$ dollars, with interest as aforesaid, besides the costs of this action.”

The defendants were partners in business under the firm name of C. S. Stettauer & Co. The evidence tended to show that during the month of April, 1868, the plaintiff delivered to the commissary, under the contract, a quantity of beef, which was accepted by the commissary, and which, at the contract price, entitled the plaintiff to draw upon the defendants for a sum greater than four thousand five hundred and five dollars and ninety-seven cents. The plaintiff drew his draft at twenty days' sight, dated May 1, 1868, for three thousand five hundred and five dollars and ninety-seven cents, to the order of himself, upon the defendants, and transferred it for a valuable consideration to a firm of Dold & Brunswick. This draft was upon its face certified to be correct by the government commissary. A notary testified without objection, that he presented this draft for acceptance at 45 Murray street, to a person representing Charles S. Stettauer & Co. That a memorandum across the draft in the words, “Protest for non-acceptance. D. S. Fanning, Notary Public,” was in the handwriting of witness. The witness testified that he recollected nothing about the presentment of the draft apart from the memorandum, and that the reason he said he presented it to a person representing the defendant's firm was, that it was his habit always to do so, and he spoke entirely from his habit. No question was made upon the trial as to the place of presentation being 45 Murray street, and not 44 Hudson, named in the contract.

It appeared that about August 20, 1869, the defendant's firm of C. S. Stettauer & Co. was dissolved by written articles signed by the various members of the firm. The articles referred to the contract now in

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suit, and a schedule stated : "The contract owes Andreas Dold" (a member of Dold & Brunswick) "on draft drawn by Patterson for three thousand five hundred and five dollars and ninety-seven cents." After the bill had matured, the plaintiff paid it to Dold & Brunswick, who re-delivered it to plaintiff. There was much evidence that the defendants who appeared in this action had after the maturity of the bill promised on several occasions to pay it.

At the conclusion of the testimony on both sides, the counsel for the defendants moved for a non-suit as to the draft for three thousand five hundred and five dollars and ninety-seven cents, on the grounds :

First. That the plaintiff had no right, under the contract, to draw any drafts, except for beef delivered up to the first day of some month ; that is to say, on March 1, 1868, for the beef delivered in February, 1868 ; on April 1, 1868, for the beef delivered in March preceding ; on May 1, 1868, for the beef delivered in April preceding ; and on May 22, 1868, for beef delivered between April 30 preceding and May 22.

That the plaintiff could draw but four drafts in all under the contract.

Nor could the plaintiff, when entitled to draw a draft, draw one for less than the amount due him up to the first day of some month or May 22, unless he expressly released the defendants from the balance of the payment for which he was entitled to draw.

Second. That it appeared that the draft of May 1, 1868, was drawn for a less amount by some thousands of dollars than the plaintiff was entitled to draw for.

Third. That the commissary agent, Rosenthal, had no authority to endorse as correct any drafts not drawn in pursuance of the terms of the contract. That his authority to so endorse must be strictly pursued.

Fourth. That as to this draft, there was no proof at all of any kind of presentment for payment ; that, indeed.

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there was no competent proof of any presentation of that draft for acceptance.

Fifth. That the evidence shows that at the time of the alleged presentment for acceptance and payment and the refusal to pay the draft in question, it was held by persons other than the plaintiff, to whom he had negotiated the same for value, and who knew it was drawn under the contract in question, and took it on the faith thereof; and that the cause of action against the defendants, arising upon that refusal, was therefore in those other persons, and had never been assigned to or become re-vested in the plaintiff. That the cause of action did not arise on the draft, the defendants not being parties thereto, but upon the refusal to pay it; and the plaintiff did not become re-vested with that cause of action by subsequently taking up the draft as he did.

The referee denied the motion for a non-suit, to which decision the counsel for the defendants Stettauer excepted.

Defendant's counsel also moved for a non-suit as to the four other drafts, but as the final decision was in his favor as to them, the motion and grounds therefor need not be enumerated here.

The counsel for the defendants requested the referee in settling this case to find the following facts:

First. That the draft of May 1, 1868, for three thousand five hundred and five dollars, specified in his report, was never presented for acceptance or payment to any member of the firm of C. S. Stettauer & Co. personally.

The referee refused so to find on the ground that he did not consider such finding material to the issue. Defendant excepted, and then requested the referee to find one way or the other as to this fact; that is, either that the draft was or that it was not presented for ac-

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ceptance or payment to any member of the said firm personally. The referee refused so to find on the ground that he considered the question presented by such finding immaterial. The defendant excepted to such refusal.

Second. That the said draft of May 1, 1868, was never presented for acceptance at the office of the defendants (C. S. Stettauer & Co.). Nor was that draft ever presented at their office for payment. The referee refused so to find, and finds the contrary. Defendant excepted.

The other material matters sufficiently appear in the opinion.

R. W. Townsend, attorney, and *A. R. Dyett*, of counsel for appellant, urged :—I. The referee erred in admitting the deposition of Andrew Napier. If Charles S. Stettauer never had answered, a joint debtor judgment might have been rendered which would not have affected his separate property, but having answered, it was impossible to render a judgment which would not affect him personally.

II. The referee erred in refusing to non-suit the plaintiff. (a) The draft being for less than the whole of the amount of beef delivered during the preceding month, was not authorized by contract. Each payment, like monthly payments of rent on a lease, was indivisible, and he could not split up his demand therefor by drawing several drafts which, if he could draw, he could negotiate to third parties (as indeed he did), and thus compel the defendants to make separate payments (it might be of one dollar apiece), to a legion of assignees, which, would be entirely inadmissible (15 *Johns. R.* 229; 16 *Id.* 121; 1 *Wend.* 487; 16 *N. Y.* 54, 87, 548; 43 *Id.* 243; 1 *Sween.* 19; 19 *Wend.* 207; 54 *Barb.* 191; 3 *Keyes*, 40). We do not mean that the plaintiff might not release the defendants from liability for the

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residue of the monthly payment, but his intention to do so should be expressed ; and that he did not intend to do so is evident from the fact of his drawing other drafts. Without such a release it is perfectly evident that if the defendants should voluntarily pay a draft for the less sum they would thereby consent to the severance. If the payments under the contract were to be made generally, without any previous demand, and an action were brought for a part of an indivisible payment, the plaintiff could recover, because he might sue for a part, and the only consequence would be that the judgment would bar a recovery for the residue. But where a demand is necessary, especially where as here, a prescribed formula is to be observed in making it, such a demand is a condition precedent, and the plaintiff can not recover on a specific demand of a part only, without an express release of the residue, not because he sues for a part only, but because the defendants were not obliged to comply with such a demand ; and the defect, therefore, is in the demand, and the condition precedent has not been complied with. (b) A presentment of the draft for acceptance was not proved. The only semblance of evidence in the case as to the presentment of the draft for acceptance, is that of the notary, Fanning. And the defendants both testified that it never was presented. It was necessary, to enable the plaintiff to recover in this action, under the contract in question, to prove a personal presentment of the draft to the defendants or some of them. It can not be pretended there is any evidence of such a presentation. The referee refused to find one way or the other on the subject of personal presentment, on the express ground that he did not consider such finding material to the issue. (c) There was no cause of action in the plaintiff. In addition to what is stated in the case, it is deemed necessary simply to add that the drafts in question having been drawn and endorsed as

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correct by the commissary agent under the contract in question, for the purpose of payment of the money due thereunder, and negotiated for value to, and taken by, the parties to whom they were so negotiated on the faith thereof, the transferees were assignees of the plaintiff's rights and interests, *pro tanto*, under the contract (*Hall v. The City of Buffalo*, 1 *Keyes*, 193, 198, and 200; *Morton v. Nailor*, 1 *Hill*, 583; *Young v. Wardens*, 61 *Barb.* 489; *Shuttleworth v. Bruce*, 7 *Rob.* 160; *Lewis v. Berry*, 64 *Barb.* 593; 25 *N. Y. Rep.* ; *N. Y. Rep.* 179; 64 *Barb.* 593, 597, 598; 3 *Bosc.* 505; 46 *N. Y. Rep.* 660; 1 *R. S.* 768, §§ 6-9; 7 *Hill*, 577; 34 *Barb.* 630; 15 *Johns. R.* 6; 15 *Abb.* 280; 17 *Wend.* 508; 40 *Barb.* 368). There is some evidence in the case tending to show that the defendants promised to pay this draft, but this promise is unavailable to help the plaintiff for several reasons. (1). There is no allegation of any such promise in the complaint which is drawn upon the theory (and so expressly stated) that this draft was drawn in pursuance of the agreement, certified by the commissary agent, and that the defendants refused to accept, honor, or pay it, and damages are claimed by reason of such failure. (2). The promise, if made, was made after the draft had been presented for acceptance and payment (so far as it was presented) and after it had got back in the plaintiff's possession, and was in possession first of the witness Dold, and then of the witness Jacobs for collection, except, however, the promise to the witness Marcus Brunswick, which was in the summer of 1868. (3). It did not appear that at the time that promise was made by the two defendants by whom it was made that they or either of them had any knowledge that the draft was drawn for less than the full amount of the monthly payment; but on the contrary they both testified and they were not contradicted, that they had no knowledge on the subject; and (4). The promise, if made, had

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had no consideration, and was not binding, nor had it ever been relied on, and at best would have been but an item of evidence tending to show the correctness of the draft, whereas, its incorrectness was expressly proved and, indeed, admitted.

Compton & Root, attorneys, and *Elihu Root*, of counsel for respondent, urged :—I. The exception to the admission of Napier's deposition should be overruled. His interests were fully protected by the limitation on the effect of the deposition as to him.

II. The draft for three thousand five hundred and five dollars and ninety-seven cents, was drawn in accordance with the contract. The sole objection to the validity of the draft presented by the defendants is, that it was not drawn for the full amount that was due. They say that the plaintiff was entitled to draw on the first of each month one draft only for the price of the beef delivered during the preceding month, and could not divide the amount into a number of different drafts. (1). The first obvious answer to this proposition is, that if it were of any force at all it would be not against the first draft, but the second, should it be presented. If the plaintiff had power to draw but one draft under the contract for April beef, this draft exhausted his power, and all subsequent drafts would be invalid—so much the better for the defendants; but the one draft he did draw while he had power would not be affected. (2). No such limitation is to be found in the contract. If they wished but one draft to be drawn each month for the whole of the previous month's beef, they should have provided for it in the contract, and agreed to pay by accepting a draft on the first of each month. (3). It is evident, from the circumstances of the parties, that their intention in contracting, was to provide for drafts to be used as the plaintiff might require. (4). It is evident from the

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acts of the parties that the construction of the contract now contended for by the defendants was not in the minds of either party before the commencement of this action. The drawing of a draft for two thousand six hundred and one dollars and eighty-eight cents, March 11, and six hundred and sixty dollars and twenty-five cents, on April 3, was totally irreconcilable with that construction. (5). If there be any question upon the face of the contract of the nature of the drafts authorized, the circumstances above mentioned must govern its construction in plaintiff's favor (*Ulster Co. Bank v. McFarlan*, 3 *Denio*, 553, 564). (6). The provision for payment was on the defendant's part, and must be construed most strongly against them (*Ulster Co. Bank v. McFarlan*, *supra*).

V. The defendants refused to accept the bill. The evidence of the defendants Charles and Louis Stettauer, that they did not remember to have seen this or any of the drafts except the two paid, weakened as it was by the evidence of Hatch and the subsequent admission of Louis Stettauer, was sufficient to justify the referee's finding that the drafts had been presented both for acceptance and payment and both had been refused. The dissolution agreement, and the interviews with Dold, Jacobs and Brunswick establish the fact that for a long period before the commencement of this action the defendants knew that the draft had been presented, had not been accepted, was held for payment and payment required of them; and that defendants had promised to pay the draft in question which as against the demands by Dold and Jacob were sufficient, whether drafts were shown or not (*Etheridge v. Ladd*, 44 *Barb.* 69). It was, then, the defendants' duty to pay the draft precisely as if they had accepted it (*Williams v. Germain*, 9 *B. & C.* 468, 477). The refusals to pay the draft more than twenty days after presentment and non-acceptance involved a refusal to accept, and adopt-

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ed and made the defendants, the refusal of whatever person was in charge of their office when the presentment was made.

BY THE COURT.—SEDGWICK, J.—I am of opinion that the judgment should be affirmed, and proceed to examine the exceptions argued on this appeal by the appellant's learned counsel.

A deposition *de bene esse* was offered in evidence. This had been taken after Louis Stettauer had answered, but before Charles S. Stettauer had appeared or answered. Counsel for Charles S. Stettauer objected to the admission at all of the deposition, on the ground that it was taken before Charles S. Stettauer had appeared. If this were so, the referee would not have been justified in preventing the plaintiff using it as testimony against Louis Stettauer. He, therefore, properly admitted it. At the same time he made a ruling which by misprinting, as I think, does not appear correctly in the printed book. The meaning of the referee, was, I have no doubt, that, although admitted as against Louis Stettauer, the deposition would not affect Charles Stettauer, excepting as it would have affected him as partner of Louis, if Charles had not appeared at all. Perhaps as the case stood, under our system of practice, this might have been hard to accomplish, yet the referee was correct in his ruling upon the objection made.

The defendants moved for a non-suit on the ground that it appeared on plaintiff's case, that when the draft in question was drawn, there had been actually delivered one thousand dollars worth of beef, at least, more than was included in the draft, which was for three thousand five hundred and five dollars and ninety-seven cents. The argument was, that by the contract, payment was to be made on the first day of each month, in drafts at twenty days' sight on C. S. Stettauer & Co.;

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that the plaintiff had no right to draw, nor had the commissary to endorse, any draft except in accordance with this contract; that the defendants were not obliged to pay any drafts not drawn in accordance with the contract; and that if the plaintiff could draw for any part less than the whole of the amount of beef delivered during the preceding month, there is no limit to the number of drafts that he might draw.

Undoubtedly, the form of the contract is the only basis of the obligation of the defendants to the plaintiff, but the defendants must rely upon the words as they are. The contract says that, after the beef has been delivered, the defendants promise that payment shall be made (of course by them), on the first day of such month in *drafts, not draft*. The defendants therefore can not rely on this provision as establishing their right to claim that they only promised to pay, if a single draft was presented which was for the exact amount of beef delivered in the preceding month. Nor does this provision establish as a condition precedent to the obligation to pay that there should be a demand for the payment of such a draft. The reasonable construction of the provision is, that the beef of one month is to be paid, not in cash at the end of the month, but by means of drafts drawn by plaintiff, the payment of which should become due on the twentieth of the following month. The defendants would not be subjected to annoyance from the amounts of the drafts being made very small. The number is not expressed, but the law construes the contract with reference to the transaction provided for by it.

As to another ground upon which a non-suit was asked, viz., that there was no evidence that the draft had ever been presented to the defendants for acceptance, the testimony of the notary Fanning being insufficient from its peculiar character, and each of the defendants having testified that the draft was not pre-

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sented, I am of opinion that the referee was at liberty to find, as he did, that the draft was presented upon the testimony showing that the defendants had repeatedly promised to pay the particular draft. Looking at this as mere circumstantial evidence, the referee had a right to infer that all had been done as to the draft, which was necessary to create a legal liability in reference to it, on the part of the defendants. There was no sort of evidence that the defendants promised under a mistake as to the facts, or from a benevolent motive, or a moral and not legal obligation. It is not necessary, therefore, to pass upon what would have been the effect of the notary's evidence, if his had been the only testimony in this case.

Another ground upon which a non-suit was asked, was that it appeared that the cause of action was not in the plaintiff, because that at the time the draft was presented, it was owned by another than the plaintiff, who knew that it was drawn under the contract proven. This is supported by the argument, that the delivery of the draft was an assignment *pro tanto* of what was due to plaintiff under the contract. This has no solid foundation. The draft was properly a bill of exchange only. It could operate as an assignment, only if on its face it appeared to be drawn on a particular fund in defendants' hands. But it appeared in all the parts that made it a bill, to be drawn on the defendants generally. If it were an assignment, its re-delivery to plaintiff, for a valuable consideration, made it a re-assignment to him of what it originally transferred. Indeed, the plaintiff's action was upon the original contract. He had delivered the beef, and defendant had not paid for it in the manner provided. The plaintiff proved that he had complied with all the conditions precedent that the contract implied should be performed on his part. The damages suffered by plaintiff were at least the amount of the draft.

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The proof that was given as to the delivery of beef, and the promises of the defendants to pay their draft was sufficient to sustain the referee's finding as matter of fact, that the beef on account of which the draft was drawn, had actually been delivered.

There were other exceptions argued, but it is not necessary to examine them, as they related to other drafts in regard to which the referee's findings and conclusions were in favor of defendants.

The judgment should be affirmed with costs.

CURTIS, J., concurred.

ISAAC FAULKES, PLAINTIFF AND APPELLANT, v.
JACOB C. KAMP, DEFENDANT AND RESPOND-
ENT.

I. SUBSTANTIAL RIGHT.

1. WHAT ORDERS DO NOT AFFECT IT.

- a. *Generally*—Orders directing a pleading to be made more definite and certain do not.
- b. *Specifically*—An order directing a pleading to be made *more definite and certain* so that as between two causes of action contained therein—the one based on the affirmance of a certain contract, and the other on its rescission—it shall clearly appear *upon which one the party pleading elects to proceed*, does not.

II. ELECTION OF CAUSES OF ACTION.

1. MOTION AT SPECIAL TERM TO OBTAIN.

1. In a proper case may be obtained by a motion at special term to have the pleading made *more definite and certain*.
 - a. PROPER CASE, WHAT IS.
 1. When the *allegations of the pleading* are such as to *leave it*

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uncertain whether the party pleading puts himself on a cause of action founded on the affirmance of a contract therein referred to, or on one founded on a rescission of such contract he may be compelled to make his election by an order, made on a motion therefor, directing him to make the pleading more definite and certain, so that it shall clearly appear whether he elects to affirm or rescind.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Appeal from an order.

Defendant moved at special term—

“That plaintiff be required to make his complaint more definite and certain in this, to wit: That plaintiff be required to allege in his complaint, by apt and proper allegations, so that it shall clearly appear whether the said plaintiff elects to rescind and hold void the said contract of purchase and sale in the complaint set forth, or whether he elects to affirm the same and have a judgment for a specific performance thereof, or damages for a breach thereof.”

After hearing the parties, the special term ordered “that the plaintiff be required within ten days from the date of this order to make the complaint in this action more definite and certain, so that it shall clearly appear whether the plaintiff elects to rescind and hold void the contract of purchase and sale, or whether he elects to affirm the same and have a judgment for specific performance thereof, or damages in case specific performance can not be decreed, &c.”

From this order the present appeal is taken by the plaintiff.

The contents of the complaint sufficiently appear in the opinion.

Appellant's points.

Charles N. Judson, attorney, and *E. H. Baron*, of counsel for appellant, urged:—I. There is no such thing as a motion to compel a plaintiff to elect what he will claim from the facts alleged and proved. A motion may in some cases be made to compel a plaintiff to elect which of two inconsistent counts or causes of action he will abide by, where he has set forth two separate and distinct causes of action in his complaint and that the other or others be stricken out.

II. What the defendant complains of is, that the plaintiff asks for alternative relief; and the order as made amounts to a decision that a plaintiff can not ask for alternative relief. The contrary is too well settled to leave the question in doubt (*Young v. Edwards*, 11 *How.* 201; *Stevenson v. Buxton*, 8 *Abb.* 414; *Stevenson v. Buxton*, 15 *Id.* 352, 355; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 *N. Y.* 357; *N. Y. Ice Co. v. N. W. Ins. Co.*, 21 *How.* 295; *Greason v. Ketaltres*, 17 *N. Y.* 491, 492; *Wells v. Yates*, 44 *Id.* 525; *Bidwell v. Astor, Mutual Ins. Co.*, 16 *Id.* 263; *Barlow v. Scott*, 24 *Id.* 40; *Davis v. Morris*, 36 *Id.* 571, 572).

III. A plaintiff may even go further and claim and have allowed him both legal and equitable relief in the same action (*Bidwell v. Astor Ins. Co.*, 16 *N. Y.* 263; *Phillips v. Gorham*, 17 *Id.* 270, 274; *Wells v. Yates*, 44 *Id.* 525; 56 *Id.* 12, 20, 21; *Bradley v. Aldrich*, 40 *Id.* 512; *Davis v. Morris*, 36 *Id.* 572).

IV. The prayer for relief is not important if the defendant answers; and if he has no defense, it certainly is not (*Code*, § 275; *Marquet v. Marquet*, 12 *N. Y.* 341; *Jones v. Butler*, 20 *How.* 189, 191). The order, then, restricting the plaintiff to a particular or single claim for relief, and requiring him to state in his complaint that he will not ask for any other, is more than can be required of a plaintiff. It is depriving him of substantial rights and should be reversed.

V. Section 160 of the Code, under which this motion

Appellant's points.

is made, does not authorize such a motion. That merely provides that, "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain by amendment." This is no such case. There is no pretense that the allegations in the complaint are indefinite or uncertain. It is the prayer for relief that is complained of; and it is not pretended that that is indefinite or uncertain, but only that there is too much of it, or too many of them. The defendant treats the prayer for relief as a cause of action, and then attempts to make this motion answer for a demurrer to it as for a misjoinder. That is new practice not provided for by the Code.

VI. The complaint, as required by section 142 of the Code, contains a plain and concise statement of facts constituting a cause of action. The plaintiff claims, from the facts alleged, to have a contract reformed, and damages for the breach or failure to give a complete title, or that if the defendant is unable yet to give a complete title, then that the contract be annulled and canceled, and the plaintiff recover his damages for the fraud and failure of the defendant. This makes but a single cause of action (*Garner v. Wright*, 28 *How.* 92, 94; *Gooding v. McAllister*, 9 *Id.* 123; *Cahoon v. Bank of Utica*, 7 *N. Y.* 486; *Jeroliman v. Cohen*, 1 *Duer*, 629). And it is a cause in equity, whether it is to reform the agreement and for damages (*Wells v. Yates*, 44 *N. Y.* 531, 532), or whether it is to have the agreement canceled and the plaintiff compensated in damages (*Story's Equity Jurisprudence*, § 692, 695). And even in such a case, where the court gives no equitable relief, the court of equity may retain the cause, and give compensation in damages (*N. Y. Ice Co., v. N. W. Ins. Co.*, 23 *N. Y.* 357, 359; *Barlow v. Scott*, 24 *Id.* 40; 56 *Id.* 12, 20, 21).

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Edwin S. Babcock, attorney, and *Freeman J. Fithian*, of counsel for respondent, urged:—I. An appeal does not lie from this order, because it does not come within either of the subdivisions of section 349 of the Code. The order does not involve the “merits of the action” or “any part thereof,” or affect a “substantial right.” It is a mere matter as to time and “form of procedure,” and in no way affects any right or merit of the plaintiff (*People v. N. Y. Central R. R. Co.*, 29 *N. Y. Rep.* 418; *Talman v. Hinman*, 10 *How.* 89; *Field v. Steward*, 2 *Sween.* 193).

II. But if appealable the order should be affirmed. (1). The complaint in effect states two distinct causes of action, by stating a set of facts or transactions on which either of those two causes of action may be predicated; and these two causes of action are inconsistent and could not be properly united in the same action. And if they were separately stated defendant could demur for that cause (*Smith v. Hallock*, 8 *How.* 73; *Hulce v. Thompson*, 9 *Id.* 113; *Colwell v. N. Y. & E. R. R. Co.*, 9 *Id.* 312; *Adams v. Bissell*, 28 *Barb.* 382). The case of *Hall v. Hall* (38 *How.* 97), is not applicable, because in that case the pleadings were so drawn as to give the defendant a right to elect whether or not there should be a partition. (2). The principle upon which the order appealed from rests is fully set forth in the following authorities, which is, in substance, that a plaintiff shall not be permitted to occupy an uncertain and equivocal position in court, or prefer inconsistent and contradictory claims in the same matter (*Morris v. Rexford*, 18 *N. Y.* 552; *Bank of Beloit v. Beale*, 34 *Id.* 473; *Seymour v. Van Curen*, 18 *How.* 94; *Maxwell v. Farnam*, 7 *Id.* 236; *Chappel v. Skinner*, 6 *Id.* 338).

BY THE COURT.—SEDGWICK, J.—I am of opinion that the order of the court affected no substantial right of the plaintiff. It has been several times decided in

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this court, that when it appears that the court below has ordered the party to make pleadings more certain and definite, no substantial right is involved. In this case the complaint alleges facts, in such a way that the plaintiff is enabled to claim that he had set out a cause of action on a contract existing at the beginning of the action. There are also in the complaint other allegations which equally enable the plaintiff to claim that the complaint notified the defendant that the plaintiff's cause of action was placed upon the avoidance by the plaintiff of the contract because of the defendant's fraud. If this is not correct, it is not, only, because the complaint has omitted to aver some fact which is necessary to a cause of action, upon the contract, or for the avoidance of the contract. Whether the plaintiff has a cause of action upon either set of allegations can be examined only upon demurrer. A cause of action upon the contract is not consistent with a cause of action upon the avoidance of the contract. This being the contract, the order of the court directed the plaintiff to notify the defendant by an amendment of the complaint upon which cause of action the action was brought. No right of substance would be affected by the plaintiff doing what was required of him. If he did not do it at the beginning, the election would have to be made at some stage of the case. So far as the plaintiff was concerned, it was matter of form. So far as defendant was concerned, he had a right that the complaint should clearly express the cause of action—of course the order did not limit the plaintiff in asking any relief he saw fit to claim upon the cause of action he relied on.

But if a substantial right of plaintiff was affected, I think the order was correct. The complaint taken as a whole, made it evident that the plaintiff put himself upon the contract and the avoidance of the contract, leaving it uncertain upon which the action was

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to proceed. It could not proceed on both. The defendant had a strict right to know, at the start, what case the plaintiff meant to go upon.

The order should be affirmed, with ten dollars costs and disbursements.

CURTIS, J., concurred.

JOSEPH W. FISKE, PLAINTIFF AND RESPONDENT, v.
CHARLES F. ALLEN, DEFENDANT AND APPELLANT.

I. CREDIT, TO WHOM GIVEN.

1. CHARGE AND PROOF AS TO ISSUE ON.

- a. CHARGE. A charge that if defendant did or said anything from which plaintiff had *a right to suppose* that the sale was being made to him and not upon the responsibility of any other party, he would be himself liable, *without adding the proviso*, "if the plaintiff meant to sell to him," or some phrase of similar import, does not constitute error.

This proviso is *implied* in the words of the charge; for

1. Plaintiff *could have no right to suppose* that a sale was being made to defendant *unless he had done* or said what was necessary to make himself a party thereto.

b. PROOF.

1. The original order being in writing purporting on its face to come from a person other than the defendant, and by that person written in the order book, and it being brought out on plaintiff's cross-examination that the sale was entered in the other books as being made to such other person, the admission of evidence on the re-direct, that the entries in the other books were taken from the entry in the order-book, is not cause for reversal. It did not injure the defendant.
2. Where the defendant introduces proof that by a contract between him and the person to whom the plaintiff charged

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the goods, he was bound to pay such person for the goods, it is not error to allow the plaintiff to prove that defendant has not paid such person.

1. This is an application of the *principle* that proof *otherwise immaterial and improper*, may by the course of the trial become *material and proper*.
8. *Entries* in books of account making charges against a particular person, are *not conclusive* evidence that the credit was given to such person.

Before CURTIS and SEDGWICK, JJ.

Decided August 8, 1875.

Appeal from judgment entered on verdict.

One Chamberlain had a contract with the defendant in which it was provided, that Chamberlain should build a house for the defendant, furnishing the materials therefor, among other things, iron work called crestring. By the terms of the contract, Chamberlain would be repaid for this crestring in the last instalment provided to be paid by the defendant. Before the contract was completed the defendant and Chamberlain saw the plaintiff, who was a dealer in the kind of iron work referred to, at his office. The plaintiff testified to the conversation then had, and gave such evidence as to it, that the jury was entitled to find that the defendant then purchased some crestring from the plaintiff. There were many facts proved, tending to show that the plaintiff did not sell to the defendant, but to Chamberlain, and that the defendant only pointed out certain crestings as satisfactory to him, *e.g.* that the plaintiff knew that the contract was pending; that the original order upon the books of plaintiff was made by Chamberlain in his own name, and the transaction was thereafter entered in the name of Chamberlain; that the price was fixed after a discount usually given

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by plaintiff to contractors like Chamberlain, but not to dealers like the defendant. The interview with the defendant was two or three days before the order was written in the plaintiff's books. There was, on the other hand, some evidence given, tending to show that an arrangement had been made by the defendant with Chamberlain, under which the former was to pay directly for materials put by the latter into the house, and the money paid was to be deducted from the instalments under the contract.

The action is brought for the price alleged to have been agreed to be paid by the defendant for the materials. The plaintiff had a verdict, and the defendant appeals.

Arnoux, Ritch, & Woodford, attorneys, and *Wm. Henry Arnoux*, of counsel for appellant.

Nelson Smith, attorney, and of counsel for respondent.

BY THE COURT.—SEDGWICK, J.—I proceed to examine the exceptions argued by the learned counsel for appellant :

He urges that the judge erred when he charged that "if the defendant did or said anything from which Mr. Fiske had a right to suppose that the sale was being made to him, and not upon Chamberlain's responsibility he would be himself liable," and the argument is that if the defendant had gone so far, it would not make him liable, unless, also, the plaintiff Fiske meant to sell to Allen. Of course the learned judge would not intentionally say anything which implied there could be a sale to the defendant, apart from the plaintiff's participation in the contract for the sale. At the least, it is taken for granted through the charge, that there can not be a buyer unless there is also a

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seller. And the language of this part of the charge implies this, for Mr. Fiske the plaintiff could under no circumstances have a right to suppose, from what the defendant said, that the sale was being made to the defendant, when he knew that he had not done or said what was necessary to make him a party to the sale. The exception on this point should not be sustained.

An exception was taken to the plaintiff being asked, "How the business of his store was done, from which it will appear, how it came to be charged to Chamberlain instead of Allen." The answer to this question in connection with the question, informed the jury that the entries in the various books after entry of the order was made in the order-book were taken from the order-book. This did not injure the defendant. His argument was as strong upon the fact of the order itself, and the jury should have known that the other entries were not original.

The defendant excepted to the admission by the court, of a question put to Chamberlain, viz.: "Has the defendant ever paid you for the crestring?" I do not think this should cause a reversal of the judgment. The defendant had chosen on cross-examination of Chamberlain, to ask if he was not bound under the contract with the defendant to put in this crestring or a crestring. The answer was yes. The existence of this contract, and the obligation of the parties under it, had in the course the case had taken become circumstances which the jury were at liberty to consider in ascertaining whether as a fact the defendant had bought of the plaintiff, although it was conceded by both parties that the existence of the contract was not inconsistent with the defendant's making a purchase from the plaintiff. When the defendant had thus shown that apparently, so far as the evidence then disclosed, he was bound to pay Mr. Chamberlain, it was

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another circumstance of importance, greater or less, that the defendant had not paid his liability.

Finally, I think the learned counsel is in error in his arguments based upon the proposition that the entries in the books of the plaintiff, showing that the sale was in fact made to Chamberlain, were conclusive evidence that the sale was in fact so made. *First.* The transaction occurred several days before the entries were made, and the defendant's obligation had, if at all, come into existence before the entries. *Second.* The entry was made by Chamberlain himself, and there was no conclusive evidence that the plaintiff delivered the cresting upon that order, and not upon his dealings with the defendant personally.

The substance of the whole case was disposed of fully and fairly by the judge, who instructed the jury to ascertain the facts of the interview between the plaintiff and defendant, and gave them all the rules of law that should be applied to the facts.

Judgment affirmed, with costs.

CURTIS, J., concurred.

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THE TRIBUNE ASSOCIATION, PLAINTIFF AND
RESPONDENT, v. A. BURDETTE SMITH, DE-
FENDANT AND APPELLANT.

I. APPEAL—WHEN IT DOES NOT LIE.

1. AN ORDER GRANTING RELIEF ON TERMS.

1. An appeal taken *from that part* which imposes the terms will not lie.

a. Improper terms imposed, the remedy is by appeal from the order as a whole.

1. *Unless, perhaps, the terms are separated into parts*, some of which may be reversed without affecting the others, in which case it *may* be that such parts as are claimed to be improper, may be reviewed on appeal from them only, and if found erroneous, reversed.

II. APPEAL.—POWER OF GENERAL TERM.

1. ON AN APPEAL FROM AN ORDER IN THE DISCRETION OF THE COURT BELOW.

1. It can not act as if it had the power to entertain the motion originally.

a. Whatever relief, other than the bare reversal or affirmance, either party may desire. *must be sought for* and obtained at the *special term*.

Before SEDGWICK AND VAN VORST, JJ.

Decided August 8, 1875.

Appeal from order.

The order appealed from was, "that the defendant have leave to amend his answer in this action, pursuant to said proposed amended answer, on payment of plaintiff's costs and disbursements since the notice of trial, to be adjusted by the clerk."

The defendant appeals from so much of the order, "as makes it a condition of granting the defendant

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leave to amend his answer, the payment by the defendant of the plaintiff's costs and disbursements since notice of the trial."

Rodman & Adams, attorneys; and *Charles D. Adams*, of counsel for respondent.

Walter M. Rosenblatt, attorney, and of counsel for appellant.

BY THE COURT.—SEDGWICK, J.—If that part of the order which is appealed from be reversed, the order will then allow the defendant to serve an amended answer, without the defendant's paying any costs. The condition is so framed that it can not be separated into parts, some of which may be reversed. The whole must be reversed or affirmed. If we should reverse, leaving an order absolute that the defendant may serve an amended answer, injustice would be done to the plaintiff, as certainly as it has been done to the defendant, if his argument on that point is correct. The alternative would be that on this appeal we entertain the motion anew, with the possible result of denying it altogether, or granting it upon such terms as our discretion should suggest. Although the general term may entertain an appeal from an order that is within the discretion of the court appealed from, that gives no right to act upon an appeal as if the appellate court had power to entertain the motion originally. Whatever affirmative relief the defendant is originally entitled to, he must obtain it in the court which by law has power to hear the motion and to adjust the terms.

The part of the order appealed from can not be taken from its relation to the rest of the order. It is a mere condition. It is not an independent direction. It by itself can not be reviewed. Its meaning is that the court considered that the motion should be denied,

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unless the conditions were imposed. If the court had denied entirely leave to amend, we could not say that it was an improper use of discretion. If the appellant is right in the argument that more costs were imposed, than were sufficient to indemnify the plaintiff for the change of the issue, his remedy was to appeal from the order as a whole; so that in case of reversal, the court below, on a rehearing, could settle the proper terms.

For these reasons I am of opinion the order should be affirmed, with costs.

VAN VORST, J., concurred.

JAMES H. CONANT, PLAINTIFF, v. THE NATIONAL ICE COMPANY OF NEW YORK, DEFENDANT.

I. CORPORATIONS—CONTRACTS BETWEEN.

1. ASSUMPTION BY ONE CORPORATION (A.) OF ALL THE DEBTS, LIABILITIES, AND OBLIGATIONS OF (B.) ANOTHER.

1. *Non-liability of the assuming corporation.*

1. A. is not bound to perform a contract made by B. to transfer shares of its (B.'s) stock *by transferring* an equal number of shares of its (A.'s) stock; nor is A. in any event *liable as and for damages* for the breach of such contract made by B., or otherwise, *in the value of* an equal number of shares of its (A.'s) stock.

- a. *This, although* the consideration for such assumption was the transfer by B. to A. of all the property, rights, and privileges of B.

- b. *And although* the stock of the old company was to

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be delivered in payment for services rendered in procuring some of the property so transferred.

- c. *And although* the individuals who organized the new company were the same who organized the old one, the offices of the one the same as those of the other, and filled by the same persons; the seal of the one the same as the seal of the other, and the two corporations in all other respects alike, and all the property of the old company was transferred to the new one.

Before CURTIS and SEDGWICK, JJ.

Decided August 3, 1875.

Motion by defendant for a new trial under § 268 of the Code.

The action was tried at special term. The judge found as part of the facts that a corporation called The National Ice Company, in consideration of services performed by the plaintiff for it, in obtaining leases and ice privileges, and in consideration of the plaintiff surrendering to it fifteen hundred shares of its stock, held by him, agreed on January 3, 1867, to deliver to the plaintiff four hundred shares of the stock of that company; that on February 2, 1867, the persons interested in said corporation formed the corporation, which is the defendant; that the defendant assumed all the liabilities, debts, and obligations of the said National Ice Company, and took possession of all the property, rights, and privileges of such corporation, including all the leases and ice privileges procured for it by the plaintiff, and assumed the liability of the National Ice Company to deliver to the plaintiff four hundred shares of its stock. From these and other facts found by the learned judge, he found, as the law of the case, that the plaintiff was entitled to the delivery of four hundred shares of the stock of the defend-

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ant, if delivery could be made by defendant; that if such delivery could not be made, the plaintiff was entitled to recover the value of the stock; that the plaintiff was entitled to recover all dividends declared and paid on said stock since February 7, 1867, and interest thereon; and that the plaintiff was entitled to an accounting to ascertain the amount of the dividend.

Sewell & Pierce, attorneys; and *Robert Sewell*, of counsel for the defendant.

Daniel B. Childs, attorney; and *Joseph H. Choate*, of counsel for the plaintiff.

BY THE COURT.—SEDGWICK, J.—If we look to the findings of fact made by the learned judge, or to the testimony in the case, we see that the defendant made no contract of its own with the plaintiff to deliver stock to him. At best for plaintiff, the defendant assumed the liability of another corporation upon a contract made by the other corporation with the plaintiff, to deliver its stock to him. Manifestly the plaintiff's rights relate only to that stock. The name of the other company was the National Ice Company. But the plaintiff here obtained a judgment which is based upon his having a right to the stock of the present defendant. As there was no evidence of any contract, in relation to the defendant's stock, I think there should be a new trial.

If the individuals who organized the defendant were the same who organized the National Ice Company; if that company transferred all its property to the defendant, and the defendant had no other property; if the offices were the same, and filled by the same persons; if the seal of one was used by the other as its seal; if in all other respects the two companies were alike, the National Ice Company would maintain

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its existence, and its capital stock could not be the capital stock of the defendant.

If the first company has performed and delivered its stock to the plaintiff, I think there would be no claim, that he, because of his having the stock, would be entitled to the same number of shares in the defendant's stock. But now he is not entitled to more than the legal rights that arise to him from an executory contract to deliver that stock.

This result makes it unnecessary to examine whether the present action is one in equity or at law, and in what way the parties' rights are affected by its being the one or the other. In the new trial granted, the parties can take positions so definite, that there will be no doubt on this point. If we are correct in the result, the other exceptions taken in the case present questions of law that on this appeal have no practical importance, and we do not examine, or decide, them.

There should be a new trial, with costs to defendant to abide the event of the action.

CURTIS, J., concurred.

CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

IGNACIO F. ALFARO, PLAINTIFF AND RESPON-
DENT, v. STRATFORD P. DAVIDSON AND
EDWARD R. JONES, DEFENDANTS AND AP-
PELLANTS.

PLEADINGS.

A complaint that states the employment of the plaintiff by the defendants as their agent to do and perform certain work and labor and service for them, "upon certain conditions and terms, more fully set out in a certain memorandum of agreement, which is hereunto annexed, marked 'Exhibit A.,' and forms part of this complaint" (and a copy of such agreement was so annexed), does in fact set forth the whole of said agreement, and such a complaint is not objectionable on the ground of insufficiency.

That an averment was not made in the body of the complaint, to the effect, that the whole of the agreement was in writing, is wholly immaterial. Section 159 of the Code, relaxes the strictness of former rules in regard to pleadings when it declares, that in the construction of a pleading for the purpose of determining its effect, "its allegations shall be liberally construed with a view of substantial justice between the parties," and with such liberal construction, this complaint will be deemed sufficient in all respects, and contains every element necessary to state a cause of action on the part of plaintiff for a breach of said agreement.

Opinion of the Court, by FREEDMAN, J.

DAMAGES, UPON A BREACH OF A CONTRACT.

The plaintiff is entitled to recover such as necessarily flow therefrom. These are general damages and need not be expressly detailed in the complaint, but are recoverable under the general conclusion (*Chitty on Contracts*, 985, and cases cited, edition of 1860).

To recover special damages, they must be set forth or detailed specially in the complaint. Upon proof of a breach of a valid contract, the plaintiff is entitled to recover some damages, although it may be difficult to ascertain the same, and they may be merely nominal (*Chitty on Pleadings*, vol. 1, 838 ; *Sedgwick on Damages* ; *Devendorf v. Wert*, 42 *Barb.* 227).

REVIEW ON APPEAL.

On an appeal from the judgment only, the only questions that can be reviewed are questions of law (*Parker v. Jervis*, 8 *Keyes*, 271 ; *Magee v. Osborn*, 32 *N. Y.* 669). An alleged excess of damages found by a jury, and an exception to the decision of a motion for a new trial upon the minutes of the court, can not be considered or reviewed upon such an appeal.

EVIDENCE OF DAMAGES.

Past profits may be proved as a basis for the estimation of probable profits if the contract had been fulfilled, and upon the same principle (as in the case at bar), facts and circumstances occurring after the breach and to the expiration of the time provided for in the agreement, which show or tend to show the profits that would have necessarily accrued under the agreement if kept, or the losses that were occasioned by its breach, may be proved.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from a judgment entered upon the verdict of a jury.

The points discussed and considered upon the appeal appear fully in the opinion of the court.

S. F. Cowdrey, counsel for appellants.

F. R. Coudert, counsel for respondent.

BY THE COURT.—FREEDMAN, J.—Defendant's objections to the sufficiency of the complaint as to the va-

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lidity of the agreement between the parties are not well founded. The complaint states the employment of the plaintiff by the defendants as their agent to do and perform certain work, labor, and services for them, "upon certain conditions and terms, more fully set out in a certain memorandum of agreement which is hereto annexed, marked, 'Exhibit A,' and forms part of this complaint." A full copy of the agreement thus referred to was in point of fact annexed to the complaint. The latter, therefore, sets forth the whole of the agreement, and no reason can be perceived why the same should not be held to be a valid agreement. That it is not expressly averred in the body of the complaint that the whole of the agreement was in writing, is utterly immaterial. The strictness formerly prevailing in regard to pleadings has been relaxed under the Code. Section 159 provides, that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties.

In all respects the complaint contains every element necessary to state a cause of action founded upon plaintiff's wrongful discharge before the expiration of his term of service, and plaintiff having proved a clear violation of the agreement by the defendants, it would have been error to dismiss his complaint. When there is a valid contract and it has been broken, the plaintiff is entitled to recover such damages as necessarily ensue from the non-performance or breach. These are general damages, and they need not be expressly detailed in the complaint, but are recoverable under the common conclusion (*Chitty on Contracts*, 985, edition of 1860, and cases cited).

If special damages are claimed, they must be stated in the complaint to prevent surprise on the trial, and so as to show that the plaintiff is entitled to them.

But upon the breach of a valid contract the plaintiff

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is entitled to some damages, although it may be difficult to ascertain the amount, and they may be nominal only (*Chitty on Pleadings*, vol. 1, 338; *Sedgwick on Measure of Damages*; *Devendorf v. West*, 42 Barb. 227).

The alleged excessiveness of the damages given by the jury can not be considered on the present appeal, the same being from the judgment only. The only questions that can be reviewed on such an appeal, are questions of law (*Parker v. Jervis*, 3 *Keyes*, 271; *Magee v. Osborn*, 32 *N. Y.* 669).

The exception to the decision of the motion for a new trial upon the minutes of the court, is also unavailable upon the appeal from the judgment. The only mode for reviewing such decision is by an appeal from the order (*Gregg v. Howe*, 37 *N. Y. Sup'r Ct. R.* 424).

Moreover the appellants have already been heard on their separate appeal from such order and the order has been affirmed.

These views substantially dispose of all the exceptions taken by the defendants, except those which relate to the admission of evidence showing the amount of orders obtained by the plaintiff, and those which arise upon or in connection with the charge of the court on the question of damages.

The evidence as to the amount of the orders obtained by the plaintiff, and executed by defendants, whilst the plaintiff was in the employ of the defendants, was introduced to lay a foundation upon which plaintiff's general damages could be computed. In his complaint the plaintiff did not limit himself to those orders which he succeeded in obtaining after he had been expelled from the office which afforded him most of his facilities for procuring orders by reason of its immediate vicinity to the stock exchange. He expressly averred, as the gravamen of his action, "that while the said agreement

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was still in full force and effect, and without any justifiable cause, the said defendants discharged this plaintiff from their employment, and expelled him from the office which he had held at their instance and request, and refused to recognize his authority to act for them under such agreement, or to repay said advances. That at the time of the breach aforesaid of the said agreement, the said plaintiff was doing a large and profitable business for the said defendants, and earning large commissions for himself therein."

As the plaintiff, therefore, was entitled to recover, as general damages, damages for the loss of profits which he would have realized, the evidence was admissible under the rule which allows past profits to be proved as a basis for the estimation of probable profits. Upon the same principle it was also competent to show the orders actually received by the plaintiff subsequent to his discharge and up to the time of the expiration of the agreement, and the disadvantages under which they were obtained. The proof upon this point was not objected to as incompetent, but defendants endeavored to prevent its introduction by raising other objections, which were clearly and palpably untenable.

Now as to the business done by plaintiff prior to his discharge, the court charged that there was no proof that that business would have continued at that average; that it might have been less and it might have been more, and that, therefore, it was for the jury to say, as sensible men, what amount of business the plaintiff would have done, if he had not been discharged.

As to the orders procured after his discharge, the jury were instructed that the plaintiff could not recover commissions on them as such, but that they might be considered in estimating what amount of business the plaintiff would have done, if he had been allowed to continue at the place provided for by the agreement.

There was no error in these instructions, nor in the

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refusal to charge otherwise, and the jury were thereby limited as to the effect to be given to the proof.

There being no error in the rulings below, the judgment should be affirmed, with costs.

SPEIR, J., concurred:

WILLIAM P. GLENNEY, PLAINTIFF AND RESPONDENT v. WORLD MUTUAL LIFE INSURANCE COMPANY AND OTHERS, DEFENDANTS AND APPELLANTS.

EXAMINATION OF PARTIES TO THE ACTION UNDER § 891 OF THE CODE AND RULE 21 OF THE SUPREME COURT.

This examination may be held immediately after the service of the summons. Under this statute there is no limit to the time when the examination may take place, after the commencement of the action.

The language of Rule 21 does not necessarily call for any other construction. Former decisions of this court referred to and approved in the decision of the case at bar (*McVickar v. Greenleaf*, 4 Rob. 657; *Winston v. English*, 85 N. Y. Superior Ct. R. 512).

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from an order of the special term denying a motion to vacate an order made for the examination of the defendants before trial and after the service of a summons for relief, and before any pleading had been made in said action.

This suit was commenced by the service of a summons only for relief.

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Immediately after its commencement, the plaintiff, on an affidavit showing the nature and object of the suit, and the materiality of the examination of several of the defendants as parties before trial, applied for the examination of the defendants, Daniel J. Noyes, Henry W. Baldwin, and Jeremiah H. Stedwell. An order to this effect was obtained, and summons issued. Upon the return day of the order the defendants therein named appeared, and moved to vacate the order of examination, upon the ground that it could not legally be had until after issue joined. This motion was denied, and the said defendants appealed.

F. N. Bangs, of counsel for appellants.

Robert Sewell, of counsel for respondent.

BY THE COURT.—FREEDMAN, J.—The affidavit upon which the order for the examination of the defendants was made, fully established the good faith of the application and the materiality of the examination sought. No counter affidavit was presented. If, therefore, the learned judge below had the power to make such an order as was made, he was justified in holding that the plaintiff had complied with all the requirements of the code, and the rules and practice of the court.

It is insisted, however, that the court never had, or that, if it had, the court since the amendment of the 21st rule by the convention of judges in 1874, no longer possesses the power to order an examination of a party under section 391 of the Code before issue joined.

In *Winston v. English* (44 How. 398) which was an application to vacate an order made by myself for the examination of the plaintiff *after* service of complaint to enable defendant to prepare his answer (a prior order to the same effect made by Chief Justice BARBOUR,

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before service of complaint, having been previously vacated by him), I fully examined the course of legislation and the practice of the courts concerning applications for discovery and the examination of adverse parties. I there pointed out that prior to 1870, no rule existed concerning applications for the examination of parties before trial under section 391 of the Code, and that in the absence of such a rule the practice of several of the courts differed. While the supreme court had held that under that section a party can not be examined before issue joined (*Bell v. Richmond*, 50 *Barb.* 571), the superior court had maintained that, in case of necessity, the examination may be had immediately after the service of the summons (*McVicker v. Greenleaf*, 4 *Rob.* 657). I also showed that this conflict of judicial opinion continued to exist until the passage of the 21st rule adopted by the convention of judges, which met pursuant to the requirements of chapter 408 of the Laws of 1870.

That rule was as follows: "The application for an examination under § 391 of the Code, shall be upon an affidavit disclosing the nature of the discovery sought to enable the party to frame his complaint or answer, or to prove his case or defense upon the trial, and how the same is material in aid of the prosecution or defense."

In discussing the effect of this rule in *Winston v. English* (35 *N. Y. Sup'r Ct. R.* 512, on appeal from the order hereinbefore referred to as having been made by Chief Justice BARBOUR), MONELL, J., delivering the opinion of the court, says:

"The rule, it will be seen, provides, *first*, for the examination of the defendant to enable the plaintiff to frame his complaint; *second*, of the plaintiff to enable the defendant to frame his answer; and *third*, of either party after issue.

"The rule follows in effect the construction by this court of the 391st section of the Code, in *McVickar v.*

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Greenleaf, so far as it permitted the examination *before issue*; but by necessary intendment limits the right to the purposes specified.

"The limit thus put upon the examination, namely, for a plaintiff to frame his complaint, or for a defendant to prepare his answer, is in accordance with the true intent of the statute, and does not in my judgment conflict with any of its provisions."

The convention of judges which met in the fall of the year 1874, amended the rule so as to read as follows: "The application for an examination under § 391 of the Code, shall be upon an affidavit disclosing the nature of the discovery sought to enable the party to prove his case, or defense, on the trial, and how the same is material in aid of the prosecution or defense."

In consequence of this amendment, it is claimed by the appellant, the authority at all events no longer exists to compel an examination before issue joined. But the answer to this proposition is, first, that the language of the rule as amended does not necessarily call for such a construction; and secondly, that, even if it did, the rule itself would be inoperative, in case the authority exists independently of the rule. In case of such independent existence, the constitution would not sanction a delegation of power to a convention of judges to change the statutory law of the state.

Unfortunately for the appellant, this court has steadily maintained by an unbroken series of decisions, that the authority is conferred by the Code, and that the true intent and meaning of section 391 is, that, in case of necessity, the examination may be had immediately after the service of the summons. *McVickar v. Greenleaf* (4 Rob. 657) was decided by the general term in the year 1865; and in delivering the unanimous opinion of the court on that occasion, Mr. Justice MONELL said: "As the statute now stands, there is not, in terms, any limit to the time when the examination

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may be taken, nor does there seem to be any reason for a limitation. . . . The right to examine the adverse party arises, in my opinion, immediately on the commencement of the suit, and not merely after issue joined."

This is conclusive of the question involved in the present appeal, and I am, therefore, not at liberty to treat it as an open one in this court.

The order should be affirmed, with costs.

SPEIR, J., concurred.

JOHN H. HARNETT AND OTHERS, PLAINTIFFS
AND RESPONDENTS, v. ANDREW J. GARVEY,
DEFENDANT AND APPELLANT.

In an appeal from a judgment only, the refusal of the court (in consequence of plaintiff's objection thereto) to allow the jury to take with them, on retirement, for consultation, three certain bills which had been received in evidence, is not properly reviewable by the general term.

The refusal was a matter resting solely within the discretion of the court.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from judgment entered upon verdict of jury.

F. G. Smedley, of counsel for appellant.

A. H. Dailey, of counsel for respondents.

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BY THE COURT.—FREEDMAN, J.—The questions raised by the appellant arise, with one exception, upon exceptions taken in the course of the trial to the admission of evidence. After a careful examination of the whole case, I am unable to perceive that any error was committed in that respect.

The only other complaint relates to the refusal of the court, in consequence of plaintiff's objection, to allow the jury to take with them three certain bills which had been put in evidence. This was a matter resting in the discretion of the court, and the exercise of such discretion is not properly reviewable on an appeal from the judgment merely. No reason was given by defendant's counsel why the bills should be handed to the jury, nor does it appear that the defendant has been prejudiced in any way by such refusal.

The judgment should be affirmed, with costs.

SPEIR, J., concurred.

HENRY WEHLE, PLAINTIFF AND APPELLANT, v.
THE BOWERY SAVINGS BANK, DEFENDANT
AND RESPONDENT.

ORDER OF INTERPLEADER.

Where the affidavit on which the order was made was sufficient to authorize the same under § 122 of the Code, and the opposing affidavits do not show any real grounds for refusing such order, the order should be affirmed.

The validity of an order of another court, annexed to the moving papers, in support of the motion, could not be determined on
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the motion, but was a question to be determined on the trial of the action.

Collusion between the party to whose rights plaintiff succeeded and the party claiming under such an order of another court, was not sufficient ground for refusing such the order of Interpleader, so long as the party applying for the same did not appear to be a party to such collusion.

Before FREEDMAN and SPEIR, JJ.

Decided December 8, 1875.

Appeal from an order of Interpleader made by the special term under § 122 of the Code.

Simon Sultan, of counsel for appellant.

Carlisle Norwood, Jr., of counsel for respondents.

BY THE COURT.—FREEDMAN, J.—The affidavit on which the order appealed from was made, was sufficient to authorize the court to order an interpleader, under § 122 of the Code. The order of Mr. Justice Gross, which is annexed to the affidavit, shows the good faith of the application, but its validity could not be determined upon the motion. That question is to be determined on the trial of the action against the party claiming under it. Nor did the opposing affidavit of the plaintiff show any grounds for refusing the order. Collusion between the party to whose rights plaintiff succeeded and the party claiming the fund from the bank under the order of Mr Justice Gross, is not enough, as long as the bank is free from it.

The order should be affirmed, with costs.

SPEIR, J., concurred.

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THE TRIBUNE ASSOCIATION, PLAINTIFF AND
RESPONDENT, v. A. BURDETTE SMITH, DEFEN-
DANT AND APPELLANT.

AMENDMENT OF ANSWER, TERMS OF.

Power of the court to require the payment of all costs and disbursements from and after notice of trial, and when such terms are eminently just and proper.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal by defendant from order of special term granting him leave to amend his answer.

Walter M. Rosenblatt, of counsel for appellant.

Charles D. Adams, of counsel for respondent.

BY THE COURT.—FREEDMAN, J.—The only question presented by the appeal is whether the terms imposed as a condition of amendment were proper.

The amendment allowed, involved an entire change of the defense previously interposed and the interposition of a new defense.

It was shown by affidavit in opposition to the motion that the cause had been reached and called for trial many times on the day calendar; that on each of said occasions the plaintiff was ready and anxious to proceed, but that the trial was invariably put off on defendant's motion, and that in consequence of such postponements the plaintiff had lost several terms. Other suspicious circumstances were made to appear, and upon all the papers the good faith of the application stood seriously questioned.

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Under these circumstances the court at special term not only had the power to require the defendant to pay, as a condition, all costs and disbursements of the plaintiff since the notice of trial, but the imposition of such terms was eminently proper.

The order appealed from should be affirmed, with costs.

SPEIR, J., concurred.

JOHN LEHMAIR *et al.*, PLAINTIFFS AND RESPONDENTS, v. ALMON W. GRISWOLD, DEFENDANT AND APPELLANT.

ACTION, CHARACTER OF.

Where the summons is for relief, and the complaint alleges a conversion of property, the character of the action is determined by the complaint, and is an action for a tort.

A counter-claim in such an action to be available, must arise out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or it must be connected with "the subject of the action."

The words "*the subject of the action*" mean "the facts constituting plaintiff's cause of action" (*Chamberet v. Cagney, 2 Greeney, 385*).

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from order of special term sustaining demurrer to counter-claims contained in answer.

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A. Heydenreich, attorney for appellants; *Chas. Lee Clark*, of counsel.

S. Kauffman, attorney for respondents; *Lewis Sanders*, of counsel.

BY THE COURT.—FREEDMAN, J.—The summons is for relief, and the complaint is in tort, alleging a conversion of two sums of money. For the purposes of this appeal, the character of the action is determined by the complaint.

The counter-claims demurred to, are, therefore, not available in this action under § 150 of the Code.

They do not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor are they connected with the subject of the action. The words "the subject of the action" mean "the facts constituting plaintiff's cause of action" (*Chamberet v. Cagney*, 2 *Sweeny*, 335).

The order appealed from should be affirmed, with costs.

SPEER, J., concurred.

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REON BARNES, PLAINTIFF AND APPELLANT, v.
STEPHEN BARKER, DEFENDANT AND RESPON-
DENT.

BROKER, COMPENSATION OF.

Where it appeared from the contract between the parties that plaintiff's compensation as a broker depended upon an actual sale of a certain bond and mortgage, it may be well questioned whether the procurement of a purchaser who was able and willing to purchase the same, is a fulfillment of the contract by the broker.

But in the case at bar, where it appeared that although the plaintiff procured a purchaser who was able and willing to purchase the same, *provided* the time of payment was shortened several years, and there was no evidence that the mortgagor consented to this change, and the fact was conceded that no sale took place, in such a case the plaintiff did not procure a purchaser under the contract, and was not entitled to recover any compensation.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from a judgment entered upon the decision of a single judge, (without a jury) dismissing the complaint.

Truax & Doscher, attorneys for appellant.

M. J. Thompson, attorney for respondent.

BY THE COURT.—FREEDMAN, J.—From the complaint and the testimony of the plaintiff, it appears that under the contract, as made between the parties, plaintiff's compensation as a broker depended upon an actual

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sale of the bond and mortgage in question. Under such a contract it may well be questioned whether the mere procurement of a purchaser who is able and willing, is enough. But the testimony further shows that though the plaintiff procured a purchaser who was ready and willing to take the said bond and mortgage in case the time of payment was shortened several years, he failed to procure one to take them as they were drawn and as they existed. Moreover, no legal proof was adduced that the mortgagor ever consented to the shortening of the time; and the fact remained conceded that no sale whatever took place in point of fact.

Under these circumstances the learned judge below was fully justified in finding that the plaintiff did not procure a purchaser for said bond and mortgage.

The exception at fol. 51, on the ground of immateriality, which is the only one noticed in appellant's points, is not well taken. The evidence admitted under it had an important bearing on the probabilities of the case.

The judgment should be affirmed, with costs.

SPEIR, J., concurred.

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**WILLIAM K. CLARE, PLAINTIFF AND RESPONDENT,
v. THE NATIONAL CITY BANK, DEFENDANT
AND APPELLANT.**

NEGLIGENCE.

Responsibility of principal for the negligence of employees of a person with whom he has contracted for the performance of work.

The employment of a superintendent by the party who contracts for the work, to see that the work was properly done and in accordance with the contract, does not give the party the control of the work, to that extent that he becomes liable for the negligence of the employees of the contractor who are directly under, the control and direction of the latter.

The right to select and employ and control the action of the workman or servant, whose negligence is complained of, lies at the foundation of the responsibility of a master or principal for the negligent act of such workman or servant by which another person has been injured. The person who possesses and exercises that right, is the one recognized by the law as the master.

In the case at bar the defendant and another, the owners of certain real estate in New York, contracted with different parties for extensive building improvements, alterations, and general repairs, upon the property owned by them.

The persons who contracted to do the work, employed the workmen, and controlled and directed them in their employment, and the plaintiff was injured by the carelessness and negligence of said workmen, or some one of them. The owners of the property employed a superintendent to see that the work was properly done according to the contracts and plans. This superintendent was aided and assisted by an architect, but neither the owners, the superintendent, nor the architect selected or employed the workmen or controlled and directed their labors.

Held, that the defendant was not liable to the plaintiff for an injury caused by the negligence of the workmen of the contractors, or some one of them.

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Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

Appeal from order denying a new trial.

The complaint alleged that the defendants were the owners, and in the possession, making alterations and repairs of the premises known as the westerly portion of No. 52 Wall street, in the city of New York. That the defendants so carelessly and negligently omitted and neglected to provide any safeguard or warning while engaged in making the repairs and alterations, that the plaintiff, in the course of his business, while passing over the sidewalk in front of defendant's building, and unaware of the unsafe condition of the building, and without any fault or negligence on his part, was violently struck on the head by a board which was thrown or fell from the building, throwing him upon the ground, and rendering him insensible, by reason of the negligence and carelessness of the defendants, or of their employees.

The answer was a general denial, and admitted that the defendants were, and still are the owners, and in part the occupants of the premises, and that they caused alterations to be made of the same at the time mentioned in the complaint.

The whole of the work was done under contract. Three of the contracts were in writing; the rest were verbal. The work was paid for according to contract. The accounts of the work were presented to the architect, who certified to their correctness, and drew a draft for the money. Each mechanic kept his own account, and each contractor kept his own men's accounts. The defendant did not select or employ any of the workmen.

The plaintiff had a verdict for two thousand dol-

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lars. Defendant moved for a new trial on the minutes, which was denied, and he brings this appeal.

Arnoux, Ritch & Woodford, attorneys for appellants; *Wm. H. Arnoux*, of counsel.

James S. Stearns, attorney for respondent; *Luther R. Marsh*, of counsel.

SPEIR, J.—At the time of the accident, it appears that the premises, 52 Wall street, extending through from Wall to Pine streets, were owned, the one-half westerly part by the defendants, and the easterly one-half by the New York Life Insurance and Trust Company. Mr. Henry Parish, who was a director in the defendants' bank, and a trustee in the New York Life Insurance and Trust Company, was the chairman of the building committee for both institutions. The defendants alone were the owners of the premises from which the plank fell, causing the plaintiff's injury. The improvement was jointly carried on by both companies, consisting of one building having a common entrance, and under the general management of Mr. Parish as superintendent. A new building was put up on the Pine street front, and the Wall street front was practically rebuilt. When the accident occurred, the Pine street building was pretty well finished, the front was up on Wall street, and the second story had one or two coats of plaster on. The defendants at this time occupied the rear room on the first floor on Pine street, and did not occupy any part of the second floor.

This court has decided, adopting the principle established in this and the supreme court, that the employment of a superintendent by the party who contracts for the work being done, to see that it is properly done, and in accordance with the contract, does not give him control of the work or affect his liability.

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The chairman of the building committee in this case can hardly be said to have exercised the office of superintendent. He did not make any of the payments. The routine of business adopted by him, was daily frequenting the architect's office, examining the drawings with a view of consulting with the architect, and to see if they were carried out. If he saw any defects, to speak to the architect about them, and not to the men engaged in the work, nor to the contractor. It clearly appears that the architect was the chosen agent between the defendants and the contractors, who should be the final arbiter relating to all questions in dispute between them. The payments were made to him upon his certificate; each mechanic kept his own account, and each contractor kept the account of his own men. Neither the superintendent nor the defendants, nor even the architect, selected the workmen; and this right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent.

The superintendent does not appear to have had any control over the contractors or their workmen as to the manner of performing it, and what he did do had no tendency to create the relation of master and servant, or of principal and agent, between the defendants and the contractors, or the workmen employed by them.

I am not able to find any evidence in the case authorizing the jury to find a verdict against the defendants. The only testimony in the case which throws any light upon the cause of the injury, and by whom inflicted, is that of Judge CURTIS, and that in no way points to the defendants, but rather to the servants and agents doing the work. According to his testimony, the plank appeared to come out of the top of the second story window. It was what is ordinarily called scaffolding boards. He saw a scaffolding inside of the window undergoing some change, and some person

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apparently at work at the scaffolding very near the upper ceiling of the room. This, so far as it goes, is affirmative evidence, and points to the workman in charge.

Besides, the evidence is uncontradicted that the defendants at the time occupied the rear room on the first floor on Pine street, and did not occupy any part of the second floor.

The case can not be distinguished in principle from those already decided by this court, and it does not seem necessary or useful to repeat the reasoning in those cases.

Judgment should be reversed, and a new trial ordered, with costs to appellants to abide the event.

FREEDMAN, J.—On the second appeal (35 *N. Y. Superior Ct. R.* 261), the general term of this court held, that under their answer the defendants had a right to show that the work was done for them by contract, under independent contractors, over whose workmen the defendants had no control, the workmen being responsible to the contractors only. Under the permission thus given, the defendants have now supplied such proof, and the same, as given, constitutes a defense on their part to plaintiff's cause of action.

I, therefore, concur in reversing the judgment, and ordering a new trial.

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**A. CLINTON BIRD, PLAINTIFF AND RESPONDENT, v.
BESSON J. AUSTIN, IMPEADED, ETC., DEFEN-
DANT AND APPELLANT.**

COPARTNERSHIP.

Effect of the appointment of a receiver of its effects, and the transfer of the same to him, &c., upon contracts of service between the firm and its employees. Such a result does not operate as a rescission on the part of the copartnership of a contract between the copartnership and one of its employees.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

The action is brought to recover of the defendants the balance of eighty-four dollars and seventy-two cents for services for the months of January and February, 1872, at the rate of one thousand five hundred dollars a year; also for a breach of contract alleging that on January 5, 1872, the defendant agreed to pay the plaintiff as head clerk at the rate of two thousand dollars a year, and that he continued to serve the defendant from January 1, 1872, until March, 1872, when he was wrongfully, unlawfully, and without cause by them, discharged.

It was shown on trial that Heath & Austin were the general partners of the firm of "E. A. Heath & Co," which firm was formed August 1, 1871. That John D. Harrington was appointed receiver of the co-partnership property February 28, 1872, and filed his bond February 29, 1872, and entered upon his duties March 1, then next. By the order appointing the receiver, he

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was authorized in his discretion to make sales, and for the purpose of making them more advantageously, to continue the business of the firm, or part thereof, as he might deem advisable.

The question litigated before the jury had regard to the alleged contract made by the parties on January 1, 1872, for an increase of salary from one thousand five hundred to two thousand dollars a year, and if such contract existed, whether he was discharged by the receiver on March 1, 1872, when he entered upon his duties, or whether the plaintiff voluntarily relinquished his right to such additional salary by discharging himself.

The jury rendered a verdict for the plaintiff for the larger sum of one thousand three hundred and fifty-four dollars and fifty-six cents. The defendant moved for a new trial on the minutes, which was denied, and he brings this appeal.

Thomas F. Wentworth, for appellant.

I. T. Williams, for respondent.

BY THE COURT.—SPEIR, J.—It is quite clear that the jury has found the contract as alleged in the complaint, that the defendants were to pay to the plaintiff a salary for services rendered, at the rate of two thousand dollars a year, to commence on January 1, 1872, and to terminate on January 1, 1873, and that the plaintiff was entitled at that rate from January 1, 1872, to March, 1872, for services actually rendered when the receiver assumed his office as such. In this particular, the jury followed the instructions of the court. He told them the rate of compensation was the only question in dispute. The fact whether the plaintiff was ready to perform the services under the contract, or refused so to do, and whether the defendant

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discharged him from further duty in that respect, was withheld from the consideration of the jury. For if the law as laid down by the learned judge is sound, it must follow that, even though such a contract existed between the parties, and was partly performed up to the time the receiver entered upon his duties, the plaintiff would be entitled to recover, although he without sufficient cause refused to execute it on his part.

The court told the jury that in regard to the discharge as affecting the right of the plaintiff to recover in this action, it was not a question for them to dispose of; that the court would dispose of that, as a matter of law; that the appointment of the receiver of the property and assets of the firm of E. A. Heath & Co., operated as a dissolution of copartnership, and a transfer of all such property and assets to the receiver, *and such dissolution and transfer was a rescission of the contract then existing between the plaintiff and the defendant*, and although the receiver had authority to continue the business, and could have continued the services of the plaintiff, he was not bound to do so. Nor was the plaintiff bound to continue in the service of the receiver.

The defendant's counsel excepted to that portion of this charge which relates to the appointment of the receiver as rescinding the contract of employment by E. A. Heath & Co. The charge embraced two distinct propositions, although they are grammatically connected in the same sentence. The first relates to the dissolution of the copartnership, and the transfer of the property and assets of the firm by operation of law to the receiver. The second, the effect of the transfer as rescinding the contract between the plaintiff and defendants. The exception very clearly and specifically points out that portion of the charge as being objectionable, with sufficient accuracy, and is not, I think, justly liable to the plaintiff's criticism in that particu-

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lar. Nor do I think that the whole of the charge must be erroneous in order to sustain this exception as claimed by counsel.

The question litigated by the parties, whether the receiver discharged the plaintiff for the reason that he would not recognize his contract as claimed by him, or for any other cause, or whether the plaintiff refused to perform that contract, was taken from the jury, and the only question they were instructed to find, was what the contract was.

If the contract was rescinded by operation of law, it follows there was nothing whatever for the jury to pass upon. Again, if such a contract existed, and the plaintiff, for any cause, refused to carry it out, it was a breach on his part, and he can not recover.

Judgment and order must be reversed, and a new trial ordered, costs to appellant to abide the event.

FREEDMAN, J., concurred.

Statement of the Case.

**FIRMIN COUSINERY *et al.*, PLAINTIFFS AND
RESPONDENTS, v. JOHN PEARSALL *et al.*,
DEFENDANTS AND APPELLANTS.**

SALE OF GOODS BY SAMPLE.

The general rule is that it must clearly appear that the contracting parties mutually understood and agreed that they were dealing by sample, and that the agreement was, that the bulk of the goods not exhibited was equal in value and corresponded in quality to the sample of the same exhibited to the purchaser.

The exhibition of a portion of the goods, purporting to be a sample, is not a fact of itself sufficient to make the seller liable on an implied warranty in regard to the nature, value, and quality of the goods being equal to the sample.

The seller must represent and warrant that the goods sold correspond, and are in all respects equal in value and quality to the sample displayed.

Sale by auction. Memorandum of sale by auctioneer, proved on trial without objection. The effect of its non-appearance in the case on appeal.

If an appellant seeks to raise the question of the sufficiency and regularity of the memorandum of the sale made by the auctioneer, and which was proved on the trial without objection, he must procure the same to be incorporated in the case, and thus furnish the court the means of deciding upon its sufficiency. In such a case, the court on appeal must necessarily assume that it was sufficient, and that there was no error of the judge before whom the case was tried in deciding that the same was sufficient.

DELIVERY.

Proof of a tender of a portion of the goods, and a refusal or rejection of the same, or a refusal to receive the bulk of the goods, is equivalent to a complete delivery of the whole.

Re-sale of property once sold to a party who refuses to accept and pay for the same.

The general rule requires that the identical property sold should be separately sold in mass or by lot, and the original buyer

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credited with the proceeds of such sale. The goods should not be mingled with other like property. But if from the nature of the case such separation and separate sale was impracticable, and the general amount of like property was sold without being specifically separated from other like property, then and in such case the highest value obtained for any one lot of said property thus re-sold, should be taken as the price or value for which the original buyer should be credited.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

The action is to recover the price of lemons sold by the plaintiffs to the defendants at public auction. The defendants refused to take delivery, and the lemons were then resold at public auction and the proceeds of sale credited upon the claim. The goods arrived at New York by the steamship Alexandria from the Mediterranean, shortly before the day of sale, and were put into the hands of auctioneers, who had at the same time the selling of the rest of the cargo of the vessel. The cargo consisted of four thousand five hundred and sixty boxes of lemons, all sold at the same time by the same auctioneers, and of these the plaintiff had one thousand five hundred and forty boxes marked "M. D.," and three hundred and sixty boxes marked "A. M."

The defense set up in the answer is, that it was a sale by sample, and that the bulk of the lemons offered for delivery did not correspond with the sample, and that by the heat of the season and the vessel they had been damaged so as to be entirely worthless.

The defendants bid for and purchased three lots at varying prices, being an average of a little over five dollars and fifty cents a box, when sound lemons of the same kind were known then to be worth six dollars

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and fifty cents a box. The plaintiffs made delivery in the usual way, taking the defendants in turn as they purchased, when they came out of the vessel ; the great bulk of them were very badly damaged on the steamship, some comparatively less damaged. Three loads were sent to defendants' store, who declined to take any but the best, and to reject the rest. The rejected lemons were taken to the storehouse and condemned by the board of health, but on a resale they were disposed of, and the amount credited to the defendants. Upon the trial the defendants asked to go the jury on various questions, but the court refused, and directed a verdict for the amount claimed, directing the exceptions to be heard in the first instance at general term. To which the defendants excepted.

Evarts, Southmayd & Choate, plaintiff's attorneys ;
Joseph H. Choate, of counsel.

Nathaniel Niles, defendants' attorney ; *W. W. Niles*,
of counsel.

BY THE COURT.—SPEIR, J.—The defendants first rely upon the principal defense set up in the answer of sale by sample. They claim, that though the goods were sold as damaged, yet if sold by sample, the sample should be a fair specimen of the whole.

As a general rule on a sale by sample, it must appear that the parties mutually understood they were dealing with the sample, on an agreement or understanding that the bulk corresponded with it, even though the seller exhibit a sample at the time of the sale, that of itself will not make it a sale by sample, so as to render the seller liable on an implied warranty as to the nature and quality of the goods. But if the seller warrants that the whole bulk corresponds with the sample, he is

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liable in case it turns out to be different, although it was sold as a damaged article.

In this case it appears that the sale took place in pursuance of an advertisement made by the auctioneers, stating the quantity of Menton lemons to be sold, which could be seen on pier 20 North River.

The defendants saw some of the goods that were discharged, and some of the damaged lemons, before the sale commenced. When the sale began, the auctioneer gave express notice that the goods were sold as they were, and that no allowance would be made for anything whatsoever. It seems to have been understood by persons present, that the goods offered were a damaged lot, and it is plain that the defendants bought them at damaged prices; under these circumstances, the fact that a part of the lemons before the sale were discharged and on the dock, could not make them samples of the rest.

The defendants next contend that as no payment nor memorandum was made, nor any part of the goods accepted and received, as required by the statute, they could not be held. The auctioneer's book containing his memorandum was produced and read on the trial, and the auctioneer was examined in relation to it by defendants' counsel. No objection was then raised, nor is the memorandum to be found in the case to enable us to determine whether it complied with the statute of frauds, or the statute relating to auction sales. If the appellant seeks to raise the question, I think it was clearly his duty, in making up his case, to furnish this court with the means of deciding it. This memorandum was before the court, as appears from the record, and must have been passed upon by the learned judge who tried the cause. There is nothing to show that there was error, and it should not in such a case be presumed. There was in law a sufficient delivery of the lemons; it was not necessary to prove a complete delivery, after

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proving a tender of the lemons and rejection. The defendants purchased eight hundred and forty boxes out of one thousand five hundred and forty marked "M. D.," the rest, seven hundred were sold to other parties. These eight hundred, and forty boxes were taken in the order as they came out of the vessel, and in their turn as purchasers, and three or four truck-loads were, as a part of the eight hundred and forty, tendered to the defendants, who refused to take any but the best. They were not entitled to take their choice of the whole cargo, or out of the whole invoice by the marks of which they bought. The defendants had notice of the resale of the lemons tendered and refused, and this was evidence of the value of those damaged.

The express announcement at the sale that the goods were damaged, their actual and intrinsic value, or that they were subsequently condemned by the Board of Health, is of no consequence. It seems to me that the only practical method of re-selling the goods, under the circumstances, was to re-sell them in the mass, or by lot indiscriminately, and to credit the defendants with the highest price. The general rule recognized by the law, requiring that goods re-sold on account of a party refusing to receive them, when lawfully tendered, is that they should be separately sold, and not mingled with others. In the present case the rule could not be observed, and the plaintiffs assuming to make the sale in the defendants' interest should in fairness account, I think, for the highest price obtained. The notice to the defendants of reselling being, in the absence of other evidence, evidence to show value for the purpose of this case, the highest price must be the true measure of defendant's credit on such a sale.

I can not see that the defendants' exceptions to the refusal of the court to submit to the jury are well taken.

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Defendants' exceptions must, therefore, be sustained, unless plaintiffs consent to a reduction of one hundred and sixty-eight dollars in the amount of the verdict, in which case the exceptions are overruled, and judgment ordered for the plaintiffs upon the verdict as reduced.

FREEDMAN, J., concurred.

GEORGE B. ROCKWELL, *et. al.*, PLAINTIFFS, v.
BRIDGET McGOVERN, *et. al.*, DEFENDANTS.

DEED OF INSOLVENT. PRIMA FACIE EVIDENCE OF
TITLE.

A conveyance made by an insolvent of premises to an assignee, under and by virtue of the statute relating to voluntary assignments, &c., &c., and for the consideration of one dollar, is *prima facie* evidence of title to the premises, and should be received in evidence, and properly preceded in the order of proof, the evidence of the other proceedings under the statute. (This point was decided in this case in the Court of Appeals, 54 N. Y. 210.)

Proof following such conveyance to the effect that all the proceedings in insolvency, under the statute of which this conveyance formed a part, were null and void, destroys the effect of the deed, and the same is null and void.

In such case the conveyance must be considered as a *mense* assignment under the proceedings, and if the latter were null and void, the former was also null and void.

If the proceedings were void for want of jurisdiction, the deed or assignment must fall with them (*Vose v. Cockcroft*, 44 N. Y. 415 ; *Homan v. Brinckerhoff*, 1 *Denio*, 184 ; *Gaines v. Stiles*, 14 *Peters*, 323.)

The assignment was not voluntary ; it was involuntary in its character, and given by the assignor to obtain his discharge in these proceedings, and in case of the latter being void, the assignment

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or conveyance fails for want of consideration, for the "one dollar" consideration will be deemed to be merely formal, and does not change the character of the deed (*Morris v. Ward*, 36 N. Y. 587).

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

This case comes before the court upon exceptions taken by the plaintiffs upon the trial, and ordered to be heard at general term in the first instance.

It was an action of ejectment brought to recover certain premises in the city of New York.

Prior to December 2, 1845, the title to the premises was in one Isaac V. Paddock, who on that day executed an instrument in writing, stating that "under and in virtue of the statute concerning voluntary assignments made pursuant to application of an insolvent and his creditors, and in pursuance of an order made by Hon. ALBERT LOCKWOOD, a judge of the Westchester court, &c." "And for the consideration of one dollar," he granted, bargained, sold, &c., unto George R. Rockwell, the person who had been nominated assignee by the petitioning creditors who signed the petition for his discharge, for the benefit of his creditors all his estate, &c.

It was admitted that all the proceedings were null and void.

The facts sufficiently appear in the opinion. The court directed a verdict in favor of defendants, exceptions to be heard in first instance at general term.

John Townsend and W. McDermot, for plaintiffs.

Thomas B. Browning and Alexander Thain, for defendants.

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BY THE COURT.—SPEIR, J.—On the former trial of this case, the plaintiff, after having shown the fee to the premises to have been vested in Paddock, offered to read in evidence the deed, or more strictly the assignment executed by Paddock, acknowledged and certified to entitle it to be read, conveying all his estate, subject to certain exceptions, to the plaintiff. The deed was expressed to be “for the consideration of one dollar to me in hand paid,” and also recited that it was executed under and by virtue of the statute concerning voluntary assignments, made pursuant to the application of an insolvent and his creditors, and in pursuance of an order made by a county judge.

The reading of the deed was objected to unless the plaintiff first proved the proceedings in the matter of the insolvency of Paddock. The court excluded it, and the plaintiff excepted.

The exceptions were heard at the general term, and the ruling was there affirmed. On appeal, a new trial was ordered. The case is reported in 54 *N. Y. R.* 210.

The only question before the court, as appears from the reported case, was one relating to the exclusion of the deed before proof was given in the proceedings in the matter of the insolvency of Paddock. The plaintiff being non-suited upon the rejection of the deed, there was nothing else before the court. The court decided as the proof of the deed properly preceded in the order of proof that of the oath of an assignee, by the insolvent law, and as the oath without the deed was immaterial, the absence of that proof was no reason for non-suiting the plaintiff. Mr. Commissioner Reynolds adds, “that by the production of this deed the plaintiff established a *prima facie* title to the premises, and it should have been received in evidence.”

The case comes before us now with the admission of the deed in evidence as establishing a *prima facie* title

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in the plaintiff, and with the plaintiff's admission, that these proceedings in insolvency had before Lockwood were null and void. The plaintiff's counsel relies upon the decision in 54 *N. Y.*, as deciding that the deed by Paddock to Rockwell was sufficient of itself, and without the aid of any insolvency proceedings, to vest the title in Rockwell. That question was not in the case before the court was called upon to decide whether proper and competent evidence had been excluded on the trial. It is quite plain to my mind, the deed in question would not have been executed and delivered to Rockwell except under and by virtue of the said proceedings. The grantee, Rockwell, is named in the deed as the person who has been nominated as assignee by the petitioning creditors, who signed the petition for Paddock's discharge for the benefit of all his creditors. This instrument must be considered as a mesne assignment under the proceedings, and was in terms so understood by the parties. If the proceedings are admitted to be null and void, then it is plain that the assignment, being a part of the proceedings, must also be null and void; this seems to be too plain for argument. The deed or assignment by itself, when offered in evidence, was *prima facie* valid, and was therefore properly admitted, but if all the proceedings are void for want of jurisdiction, the assignment must fall with the rest (*Vose v. Cockroft*, 44 *N. Y.* 415; *Homan v. Brinckerhoff*, 1 *Den.* 184; *Garnes v. Stiles*, 14 *Peters*, 323).

It is claimed that although the proceeding is void, the assignment is voluntary, and if Paddock chooses to make the assignment, he should be bound by it. But the assignment is not voluntary. It is *in invitum*, compulsory, given to enable the assignor to obtain his discharge in these very proceedings, and without which, under the statute, he could not get his release. If the proceeding are void, there is no consideration to uphold the assignment, for it appears from a review of

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the whole instrument that the intention was to execute the assignment as a part of the insolvent proceedings, and "the one dollar" preliminary consideration will be deemed to be merely formal, and does not change the character of the deed (*Morris v. Ward*, 36 *N. Y.* 587).

Plaintiff's exceptions should be overruled, and judgment ordered for defendants on the verdict, with costs.

FREEDMAN, J., concurred.

ROBERT NAPIER, PLAINTIFF AND APPELLANT, v.
CHARLES H. FRENCH, *et al.*, DEFENDANTS
AND RESPONDENTS.

STATUTE OF FRAUDS.

What constitutes an agreement in writing.

A letter of the party to be bound, delivered to the other party, which states the consideration and the indebtedness, and accepted and acted upon by the latter party, is sufficient.

Construction of the statute in regard to the time when the writing should be made, signed by him, &c.

Where the indebtedness existed at the time the letter was so delivered and acted upon, by virtue of a previous parol agreement; the letter is the written agreement, and was the consummation of the previous verbal arrangement, and is in fact and in law the actual agreement between the parties, and the time of its execution and delivery being at a later date than the verbal arrangement, does not affect its validity.

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Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

The action was brought to recover the balance of an account alleged to be due from the defendants to the plaintiff for his services rendered to them as their traveling agent in selling merchandise.

The answer contains a general denial, and sets up a counter-claim for the balance of moneys due the defendants on the sale of stock of the East Side Association.

Pending the negotiation for the employment of the plaintiff, he verbally agreed to take part of his compensation, to the extent of two hundred and fifty dollars, in stock of the East Side Association. After the plaintiff had rendered his services, he wrote the following note, and sent it to the defendants :

“NEW YORK, *November 30th*, 1869.

“MR. WARD :

“DEAR SIR—Will you let me have a settlement of account. You can hold one-half the price of the twenty-five shares in the Yorkville building, and I shall pay balance in the spring, or when the scrip is issued. I do this in order to keep my word, although under existing circumstances I am not able, but will look to you for the interest which you assured me would be paid yearly on the stock.

“Yours, &c.,

R. NAPIER.”

The account asked for was rendered by the defendants to the plaintiff, who returned it to them with a written statement of this own account, wherein he charges himself with one half of the stock.

The case was referred, and the referee awarded a judgment for the counter-claim.

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W. McDermott, for appellant.

Alex. Thain, for respondents.

BY THE COURT.—SPEIR, J.—The only question presented by the appellant relates to the allowance of the counter-claim, and his objection is put upon the ground that the agreement to buy the stock of the East Side Association is void by the statute of frauds.

The referee has found that "the twenty-five shares in the Yorkville building," stated in the note or memorandum in writing, meant the East Side Association, and the said twenty-five shares of the capital stock thereof. He has also found that there was due at the time the note was written by the defendants to the plaintiff more than one hundred and twenty-five dollars, and that half the price of the said twenty-five shares was one hundred and twenty-five dollars.

When the plaintiff asked that one hundred and twenty-five dollars, being one-half the price of the stock, be charged to his account as a payment on account of the stock, he promising to pay the other half price when the certificate was issued, and he actually so charged himself in his account, then that was a part payment on account of the purchase, and he became liable for the balance.

The memorandum was subscribed by the party to be charged, and appears to me to meet all the requirements of the statute. It was insisted, however, that it could not be called an *agreement in writing*, but only a mere proposition made by the plaintiff and not accepted by the defendants. The case shows that it was delivered to the defendants by the plaintiff, and the parties acted on it by submitting a statement of their account in pursuance of its terms.

A further objection was made that if this letter

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could be construed as a payment, it would not take the case out of the statute, as it was not made "*at the time of the agreement.*" The fact of indebtedness at the time the letter was written, was found by the referee to be against the defendants, and more than one hundred and twenty-five dollars, the half price of the stock. Moreover, the written agreement was the consummation of the verbal arrangement made by the parties, and is in fact and in law the actual agreement between them. The defendants held the stock as collateral to plaintiff's indebtedness to them for the balance of the purchase money, as they had a right to do under plaintiff's request. A tender of this stock was not necessary before asserting their counter-claim.

The judgment must be affirmed, with costs.

FREEDMAN, J., concurred.

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HENRY JUTTE, PLAINTIFF AND APPELLANT, v.
WILLIAM J. HUGHES, DEFENDANT AND RE-
SPONDENT.

DAMAGES. WHEN SPECIAL DAMAGES CAN BE RECOVERED.

They must be averred in the complaint, else they can not be proved on the trial.

In the case at bar, the action was to recover damages for the overflow of water into the cellars of the plaintiff from the premises of defendant, caused by the defective sewerage of defendant's privies and drains.

The plaintiff offered to prove special damage, caused by the loss of rent on his premises, the tenants leaving because of the condition of the cellars, &c. The court refused to receive this evidence because there was no claim set up in the complaint for loss of tenants, &c. The only exception of the defendant that was heard and considered, on the appeal, was to this ruling, and the charge of the judge in reference thereto.

The earliest decision of this court on this subject (*Shipman v. Burrows*, 1 *Hall's Superior Ct. R.* 411) referred to, and approved.

Before FREEDMAN and SPEIR, JJ.

Decided December 6, 1875.

The plaintiff is the owner of 97 & 99 Lewis street, tenement houses, the rears of which abut upon the yard; also of No. 97 Lewis street, belonging to the defendant; and this suit is brought to recover damages for water which flows from defendant's yards into the cellars of the plaintiff's houses in such quantities as to soak and cover the floor of the cellars, and render them permanently unfit for use, and also to injure the walls and other portions of the building, and created such an offensive stench as to interfere with the plain-

Opinion of the Court, by SPEIR, J.

tiff's use of the premises, and the letting thereof. The cause of the damages complained of, alleged in the complaint, was that the defendant had failed to keep the privies, drains, and drain-pipes in his building in proper repair. The jury rendered a verdict in defendant's favor.

By stipulation, it is agreed that the only exceptions the plaintiff desires to raise on the appeal are the exceptions to the charge, and the exceptions to the ruling of the court in excluding the rental value of the premises as an element of damage.

George W. Wengate, for appellant.

Warren G. Brown, for respondent.

BY THE COURT.—SPEIR, J.—The plaintiff under the allegation in the complaint, that by reason of the defective sewerage of defendant's privies, drains, and drain-pipes, an overflow of water into the cellars of the plaintiff's houses had been caused, rendering them permanently unfit for use, offered to show special damages from the loss of tenants on account of the cellars being in this condition. The court refused to receive the evidence, as proving any special damages, upon the ground that there was no claim for damages in the declaration for loss of tenants.

The result of this ruling led necessarily to that portion of his charge where he instructed the jury that, in case they found for the plaintiff, he could only recover for the damage to the wall and building, and not for the loss of the rental value of the building. If this ruling was correct, there was nothing left in the complaint, as the evidence shows, which would entitle the plaintiff to damages in case the jury found in his favor. The jury found for the defendant. The refusal

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to receive proof of special damages, under the circumstances, was clearly right. The principle was established among the first cases decided by the learned judges who first presided on the organization of this court. Each of those distinguished justices gave his individual opinion, and the law remains to this day as it was then pronounced (*Shipman v. Burroughs*, 1 *Hall's Superior Ct. R.* 411-420).

Judgment must be affirmed, with costs.

FREEDMAN, J., concurred.

THOMAS E. FAIRFAX, PLAINTIFF AND APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO., DEFENDANT AND RESPONDENT.

I. DISMISSAL OF COMPLAINT.

1. EVIDENCE, HOW TO BE CONSIDERED ON MOTION FOR.

- a. Every *intendment* and fair and legitimate inference and presumption must be made in plaintiff's favor.
- b. If there is any conflict of evidence as to any material question of fact ; or if, in respect to any such question, the *fair and legitimate inference* from the evidence is favorable to plaintiff's cause of action ; it is error to take the case from the jury.

II. EVIDENCE.

1. BAGGAGE CHECK.

1. *Contract, not implied from, when.*

When the passage ticket calls for a passage by a particular route, and there are letters on the check attached to the baggage of the passenger, indicating that it is to go by the route called for by the passage ticket, and the baggage is trans-

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ported, not by that route, but by a road not forming a part of such route, no contract by the road not forming a part of such route, can be deduced from the fact that baggage with similar checks has frequently been carried over it.

a. Such facts do not establish the check to be the *regular check* of company whose road does not form part of the route, or that it was put by such company or its agent on baggage intended for transportation over its road.

III. CARRIER.

1. *Liability, as carrier, for baggage, when it ceases.*

1. If the owner of baggage omits to call for it within a reasonable time after its arrival at its place of destination, the liability of the carrier as carrier will cease, and that of warehouseman attach.

a. What is not a reasonable time.

1. A space of three days is not.

IV. WAREHOUSEMEN, LIABILITY OF.

1. WHAT SUFFICIENT TO RELIEVE THEM.

Where a piece of baggage was placed in the usual baggage-room, which was an inclosed room, in charge of a baggage-master, to which no one was allowed access except in the presence of such master, and remained there for some days, and was seen shortly before the owner demanded, but could not be found when the demand was made,

HELD,

1. That the warehouseman was not liable.
2. He was *not bound to show* in what manner or by whom it was taken from the baggage-room, nor to account for it.
3. Even if it were *feloniously taken* by a stranger, or one of defendant's servants, yet the warehouseman not being negligent, such taking would not create a liability.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

This was the second trial of an action to recover the value of a trunk and its contents.

Upon the first trial the plaintiff had a verdict, which was set aside upon appeal (see 37 *Sup'r Ct. Rep.* 516).

The facts, so far as they relate to the point then de-

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cided, are so fully stated in the report of the first appeal, that it is unnecessary to re-state them. Any new or additional facts proved on the second trial affecting the points already decided, will be found in the opinion below.

Upon the other point now decided and not included in the first decision, the facts are as follows:

The trunk arrived at the defendants' depot in New York between three and four o'clock on the afternoon of October 9, 1870. It was taken in charge, in the defendant's baggage room, by an employee of Westcott's Express Company, under an agreement with the defendants to the following effect:

That the express company was to occupy the said baggage-room for the receipt and delivery of the baggage of passengers arriving upon the trains of the defendants, and for no other purpose; that they would receive the baggage upon the arrival of each train, and thereupon give to the defendants a receipt therefor, designating each piece of baggage so received by the number of its check; that they would thereafter, when called upon, deliver said baggage to the owners thereof, respectively.

The baggage-room is an inclosed room. The employee remained until six o'clock, when he left the trunk and baggage-room in charge of another employee of the express company. No one besides the employees were allowed in or to come into the baggage-room. The trunk remained in the baggage-room in the custody of the persons in charge, during the 10th and 11th of October, and until the morning of the 12th. When during the morning of the 12th, the check was presented, the trunk was not to be found. The employee in charge, and who had seen the trunk just previously, could not state where it was, nor what had become of it. He said there was no one allowed there but himself. He could not tell that

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any one came in. He believed no one came in; he kept everybody out except those he had to allow there to identify baggage; he was not and could not be sure that no one came into the baggage-room that morning; he did not think there was.

The trunk was not found. It had been taken from the baggage room, by some means or persons unknown to the person in charge.

At the close of the evidence on both sides, the defendants moved to dismiss the complaint on the following grounds:

1. That the defendants did not occupy the relation of common carrier to plaintiff and his baggage.
2. That it appeared that the piece of baggage in question, coming into the possession of the defendants at Troy, checked to New York, the defendants safely carried it to the city of New York, and there had and retained it for delivery to the plaintiff, who failed to call for it within a reasonable time after its arrival, and that it subsequently disappeared without fault on the part of the defendants.
3. That after the arrival of the baggage, and having it ready for delivery to the plaintiff for a reasonable time, the defendants, after the lapse of such reasonable time, stored the baggage with Westcott's Express Company, who were responsible, if any one, for its loss.

The plaintiff asked to be allowed to go to the jury upon the point, whether the defendants used ordinary care or not in the custody of the property.

Also upon the question of fact, as to whether the defendants wrongfully delivered the property to any other party.

Also upon the question whether the defendants, through their own negligence, delivered the plaintiff's trunk to any other party.

Also upon the question whether or not the relation of common carrier did not subsist between the plaintiff

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and the defendants upon all the testimony in the cause as to the course of business between the defendants and connecting lines.

Also on the point whether, on all the evidence, the party or corporation checking the portmanteau in Montreal, was the agent of the defendant for the purpose of attaching to the portmanteau a check which entitled the plaintiff to have his portmanteau transported by the defendant as a common carrier over its railroad; and that the jury in deciding this question are to take into consideration the evidence given,

(1.) As to the purchase of the plaintiff's ticket. (2.) As to the fact that the defendant did receive the portmanteau so checked and transport it over their road. (3.) The evidence that the defendant frequently transported over its road baggage so checked. (4.) The evidence that the check on the portmanteau was the check of the defendant.

Also the point whether the defendant, under some arrangement of connecting lines, received and transported as common carriers the portmanteau.

Also the point whether the plaintiff called for his portmanteau within a reasonable time.

Also the point whether the Grand Trunk Railway Company, or any of the connecting lines, delivered the portmanteau to the defendant without the knowledge or authority of the plaintiff.

Also the point whether the baggage agent of the defendant at Troy had authority from the defendant to receive the portmanteau, and whether the defendant did then, and by the receipt of its servant, itself receive the portmanteau as a common carrier.

Also the point of whether the defendant delivered its checks to the servants and agents of the Grand Trunk Railway Company in Montreal, to be there used in checking baggage.

Also the point of whether, by any arrangement

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with the Grand Trunk Railway and connecting lines, or by the usual course of business, the checking of the portmanteau over the defendants' road was incidental to the contract of carriage of the plaintiff.

Also the point whether the checking of the portmanteau over the defendant's road was in accordance with the usual and ordinary course of business.

Also whether this was defendants' check, and whether the defendants' checks were placed in the hands of the corporation at Montreal, to use in checking baggage to New York.

The court refused each of said requests, and to each refusal the plaintiff excepted.

The court thereupon, on the grounds stated by the defendants in the motion to dismiss the complaint, directed a verdict in favor of the defendant.

The plaintiff excepted to such direction. The jury thereupon, under the direction of the court, found a verdict in favor of the defendant.

From the judgment dismissing the complaint, the plaintiff appealed.

Hammond & Stickney, attorneys, and *Albert Stickney*, of counsel for appellant, among other things, urged:—I. The universal rule requires, that, if one of two parties must suffer from the unauthorized acts of an agent, the party must suffer who has clothed the agent with the authority, and enabled him to commit the error (*Weed v. Panama R. R. Co.*, 17 *N. Y.* 362; *Johnson v. Jones*, 4 *Barb.* 369; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 *N. Y.* 61, *et seq.*). The defendant, if the Grand Trunk Railway has acted beyond its authority, has its remedy against the Grand Trunk Company.

II. When the defendant took the baggage at Troy, it was certain that some contract had been made

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with some passenger as to the carriage of that baggage. The defendant must, then, be held to take the portmanteau under that contract (*The Elvira Harbeck*, 2 *Blatch*. 336; 2 *Redfield Railway Cases*, 218).

III. But if this was not defendants' check, they were guilty of a wrong in taking the portmanteau at all. And on refusing or failing to deliver, they are absolutely liable as for a conversion, negligence or no negligence. The cases are clear and uniform on this point (*Robinson v. Baker*, 5 *Cush.* 137; *Fitch v. Newberry*, 1 *Doug.* [Mich.] 1).

IV. If the check affixed was the proper check to send the article by boat, where the plaintiff's ticket carried him, then the portmanteau has been delivered to the defendant without the plaintiff's knowledge or authority. And the plaintiff, in that case, by bringing this action, ratifies that delivery, and can hold the defendant as a common carrier (2 *Greenl. Evid.* § 210; *Sanderson v. Lamberton*, 6 *Binney*, 129).

V. If the defendant delivered the portmanteau to any person but the plaintiff, the holder of the check, the defendant is liable absolutely, as for a conversion (*Hawkins v. Hoffman*, 6 *Hill*, 586; *Powell v. Myers*, 26 *Wend.* 591; *Youle v. Harbottle*, *Peake, N. P. C.* 49; *Devereux v. Barclay*, 2 *B. & Alderson*, 702; *Wild v. Pickford*, 8 *Meeson & W.* 443). Certainly, if such delivery to another person was made by the negligence of the defendant (*Stephenson v. Hart*, 4 *Bing.* 479). The check was not produced to the defendant. It is a certain thing, if the defendants' testimony is true, that the portmanteau was delivered to a person who did not produce the check. And it is nearly as certain as anything possibly can be, that it was delivered through the negligence of the defendant or its servants. The plaintiff had the right to go to the jury as to whether this was so.

VI. But admitting that the defendant never was a

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common carrier they must do more than they have. They must prove, not only that it was a proper room, but that it was guarded in a proper manner. Now the only witness they produce to prove the care on this point on the day of the loss, is Green. Green testifies that he had no one there to help him; that he made all the deliveries with his own hands; that he delivered the portmanteau to no one, and he states positively that no one on that morning came into that room. And yet the baggage was gone. His story is clearly impossible. And no explanation whatever is given of the way in which it disappeared.

VII. Now the simple fact of the loss of the baggage being unexplained, was sufficient to entitle the plaintiff to go to the jury on the question of gross negligence (*Steers v. N. Y. & Phil. St. Co.*, 57 *N. Y.* 1).

VIII. Moreover, the defendants prove their care on the day of the actual loss, by one witness, Green. He is shown, on cross-examination, to tell a story which can not by possibility be true. It is not necessary that the plaintiff should call a witness to contradict Green. The defendants must prove their case by a credible witness. His credibility may be impeached on his own cross-examination as well as by witnesses called by the plaintiff. And the plaintiff has the right to have the credibility of Green submitted to the jury. And this was specially asked (*Stafford v. Leamy*, 34 *Superior Ct.* 272; *Conrad v. Williams*, 6 *Hill*, 447; *Koehnucke v. Ross*, 16 *Abb. N. S.* 344).

Frank Loomis, attorney, and of counsel for respondent.

BY THE COURT.—MONELL, Ch. J.—Upon the first appeal in this case, a majority of the court held that upon the facts then presented, the relation of passenger and carrier, between the plaintiff and defendants,

had not been established ; and that as the carriage of baggage was only an incident to the carriage of the passenger, the defendants were not liable as common carriers.

These propositions can not now be disturbed, unless upon the second trial the facts have been so far varied that they establish the relation which they failed to establish on the first trial.

Upon dismissing a complaint at the close of all the evidence, the court must be satisfied there is no dispute whatever in the evidence, which would require its submission to the jury. If there is no such dispute, then the law will pronounce the appropriate judgment.

Upon the motion to non-suit, the plaintiff is entitled to have the evidence taken as true, and also to have every intendment and fair and legitimate inference and presumption taken in his favor.

If, therefore, the evidence presents any conflict in respect to any material question of fact ; or, if in respect to any such question, the fair and legitimate inference from the evidence is favorable to the plaintiff's cause of action, it would be error to take the case from the jury.

Under the exposition of the law applicable to this case, as decided upon the former appeal, the only duty of this court now is, to see whether the facts proven on the first trial were essentially the same as those proven on the second trial. If they were, the former decision is *stare decisis*.

It is now claimed that certain facts, which the court upon the first appeal assumed to be established, have been changed upon the second trial. These facts are, that the trunk was to be taken with the owner, and he and his baggage to go over the same route ; that the baggage was taken by the defendants' baggage agent, through mistake or accident, without authority ;

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that the plaintiff made in effect a fraudulent representation when he checked his baggage, namely, that he intended a continuous trip through to New York. It was also assumed, that there was no evidence of any arrangement between the defendants and the Grand Trunk Railway, which would authorize any contract for the carriage of baggage by the defendants, without the passenger.

It is now insisted that the proof is different in these particulars, namely, that it shows the check was the defendants' regular check ; that there was no mistake or accident, and that there was no misrepresentation by the plaintiff.

In respect to the first fact, namely, that the check was the defendants' regular check, I do not find it supported by the evidence. There was some proof that baggage, upon which there were similar checks, had frequently been carried over the defendants' road. But the evidence did not establish that it was the regular check of the defendants, put by it or by its agents upon baggage intended for transportation over its road.

The check in question, and similar checks, were put upon the baggage at Montreal, and such baggage sometimes, or frequently, passed over the defendants' road.

In respect to the carriage by mistake or accident, the evidence was the same on each trial. The baggage-master at Troy received the baggage from another road, went with it to East Albany, and delivered it to the through train for New York.

Upon the second as upon the first trial, there was no evidence of any express misrepresentation by the plaintiff, but a misrepresentation to be implied from the purchase of a continuous trip ticket.

But the new evidence, giving it all the scope and significance claimed for it by the appellant's counsel,

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does not establish the relation of carrier and passenger between the parties.

Except under some special contract, the carriage of baggage is an incident to the carriage of the passenger, and the carrier is not responsible unless the two concur.

In this case there is no proof of any special contract, either express or implied, which would create a liability on the part of the defendants. None was expressed, nor can any be inferred from any evidence given upon either of the trials.

It is, however, further claimed, that a liability may be implied from the check attached to the trunk, which some of the witnesses admitted, was a kind of check attached to baggage which sometimes, or frequently, was carried by the defendants; and that the jury had a right from the evidence, and an inspection of the check, to infer that it was the check of the defendants; and that from it a special contract might be implied. Not only did the passenger tickets express that the passage of the plaintiff was by the *Peoples' line of steamboats*, but the testimony of the witnesses, and the check itself, indicate that the baggage was to go by the same conveyance. It was a through check from New York to Montreal, and the letters H. R. & R. R. indicate, very clearly, "Hudson River and Railroad," meaning by steamboat to Albany, and thence by "Saratoga and Rutland line" of railroad to Montreal. And being used for the reverse passage, it signifies the same routes.

There was nothing in this evidence which required its submission to the jury. They could not have legitimately deduced from it a special contract by the defendants to carry the plaintiff's baggage; and a verdict upon it in the plaintiff's favor would have been unsupported.

Upon the whole, I am unable to distinguish the

present from the former appeal ; and the decision then made must stand.

There is, however, another ground, upon which this judgment can be upheld, which is so far independent of the first ground, that it becomes a matter of no importance whether the relation of carrier and passenger existed or not. For even assuming the defendants were carriers of the baggage, and had incurred the liability of common carriers, such liability was changed into that of warehousemen, and they can be charged only as warehousemen.

This question was briefly discussed in the opinion of the court upon the first appeal. But as it did not then receive the concurrence of a majority of the court, it remains an open question.

The facts are not now different, although the appellant's counsel claims, that the defendants' evidence of care in the custody of the property should, upon the question of negligence, have gone to the jury.

It is not, however, insisted that there was any contradiction in the evidence, but merely that it was improbable in itself, and insufficient to show proper care.

It is now well settled that the liability of a railway as a carrier, ceases upon the expiration of such reasonable time after the arrival of the baggage at its place of destination, as will enable the traveler to receive and take charge of it (*Curtis v. Avon*, *Geneseo*, and *Mt. Morris R. R. Co.*, 49 *Barb.* 148 ; *Burnell v. N. Y. Central R. R. Co.*, 45 *N. Y.* 184).

In the last case, the baggage was not demanded until *two* days after its arrival, and the court held that the carriers' liability had ceased, and that of warehouseman had attached.

A warehouseman is held to the exercise of only ordinary care. The non-delivery of the property is sufficient to raise a presumption of negligence, and the burden is then thrown upon the warehouseman, to

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show that sufficient ordinary care had been bestowed on the property. If that is shown, the warehouseman is relieved from liability.

In the recent case of *Coleman v. Livingston* (36 *Sup'r Ct. R.* 32), which has been affirmed by the court of appeals (56 *N. Y. R.* 658), the liability of a warehouseman, and the rules respecting the burden of proof, are so fully stated that I need not do more than to refer to it.

In the case before us, by the omission of the plaintiff for at least *three* days to demand his baggage, the liability of the defendants *as carriers* ceased. But they were still under obligation to see that it was properly stored, and reasonable care exercised to prevent injury or loss, until it was called for (*Burnell v. N. Y. Cent. R. R. Co.*, *supra*).

The question, therefore, is, Was there any negligence by the defendants?

Their failure to produce the trunk when demanded, *prima facie* established negligence and want of due care.

Did they remove the presumption? I think they did.

The evidence shows that all due, ordinary, and proper care was bestowed upon the property. That it was not sufficient, was not the defendants' fault. It was placed in their usual baggage-room, which was an enclosed room, in charge of a baggage-master, to which no one was allowed access, except in the presence of such master. It remained in such room for *three* days, and was seen on the morning, shortly before the plaintiff demanded it. When the demand was made it could not be found.

The defendants were not bound to account for it. It was enough that they had taken the usual and ordinary care, and that the loss was not attributable to their want of care. In what particular manner, or by whom it was taken from the baggage-room, it was not

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incumbent upon the defendants to show. It may have been feloniously taken by a stranger, or even by one of the defendants' servants, yet if the defendants were not negligent, such felonious taking would not create a liability.

The care which the evidence shows the defendants bestowed upon the plaintiff's property, was all which, under the circumstances, the law required, and fully repelled the presumption of negligence.

As the evidence was without contradiction, there was nothing for the jury, and the complaint was properly dismissed.

In examining this question, I have treated the liability of the defendants as not affected by their private agreement with the express company, and have regarded the latter as, at most, the mere agents of the defendants.

The judgment should be affirmed.

SEDGWICK, J., concurred.

Statement of the Case.

KATE A. PECK, EXECUTRIX, ETC., PLAINTIFF AND
RESPONDENT, v. JACOB COHEN, DEFENDANT
AND APPELLANT.

I. NEW TRIAL.

1. APPEAL FROM AN ORDER DENYING A MOTION FOR A NEW TRIAL
MADE AT SPECIAL TERM ON A CASE, ON THE GROUND THAT
THE VERDICT IS NOT SUSTAINED BY THE EVIDENCE.

a. In such case, although the point was *not raised* at the trial,
*either on a motion to dismiss the complaint, or by a request for
the direction of a verdict*, yet it may be considered both on the
motion and on the appeal, and if the evidence be insuffi-
cient, the judgment will be reversed.*

II. EVIDENCE, PRESUMPTIVE.

1. DATE. AN INSTRUMENT IS PRESUMED, IN THE ABSENCE OF PROOF
TO THE CONTRARY, TO HAVE BEEN DELIVERED ON THE DAY OF
ITS DATE; *e. g.*, A CHECK WILL BE PRESUMED TO HAVE BEEN
DELIVERED ON THE DAY OF ITS DATE.

a. *What not sufficient to overcome this presumption.*

A check dated October 10, was given to pay interest falling
due September 1, on a bond and mortgage; the check
was probably handed to the book-keeper of the agent of the
holder of the bond and mortgage; the book-keeper was not
examined as a witness; the agent testified that the interest
was paid on September 1; that there was no indulgence or
extension; that he received no check for the payment of
interest in October, that he had never seen the check before
the trial. But it appeared that the check dated October
10, was received for the September interest, and that the
interest was not in fact paid until that check was paid..

HELD,

insufficient to establish that the check was received prior
to October 10.

* This is not in conflict with *Rowe v. Stevens* (84 *Sup'r Ct. R.*
486) and *Carnes v. Platt* (*Id.* 861). In those cases the motion was
made on the *Judge's minutes*.

This case answers the query in the head-note to *Carnes v. Platt* in
the affirmative.

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III. GUARANTY OF PAYMENT OF BOND AND MORTGAGE, PROVIDED THAT MORTGAGEE SHALL WITHIN SIXTY DAYS AFTER ANY DEFAULT IN PAYMENT OF INTEREST PROCEED WITHOUT DELAY TO FORECLOSE.

1. FORECLOSURE, WHEN UNNECESSARY.

a. When it is not commenced until after the premises have been sold under a decree foreclosing a prior mortgage, the referee's deed delivered, and the proceeds disposed pursuant to such decree.

1. *Liability of guarantor for costs.*

a. He is not liable for the cost of such unnecessary foreclosure of the guaranteed mortgage.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from a judgment and order.

The action was upon a written guaranty of payment of a bond and mortgage, made by one Henry Smith to Cohen, the defendant, and by him assigned to the plaintiff's testator. The assignment contained the following guaranty: "And for the consideration aforesaid, I do hereby guarantee the payment of the principal sum and interest secured by said bond and mortgage to the said parties of the second part herein, their executors, administrators, and assigns, according to the terms and conditions of said bond and mortgage, provided the said parties of the second part, or their assigns, shall, within sixty days after any default in payment of interest on said bond and mortgage, proceed without delay to foreclose the same."

Subsequently, a prior mortgage upon the same premises was foreclosed, and the premises sold, upon which sale, there was a surplus which the plaintiff received, but was not sufficient to pay the second mortgage.

The bond and mortgage assigned was with interest

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from March 1, 1870, payable semi-annually, with the usual thirty days' interest clause.

Upon an alleged default in the payment of interest which became due and payable on September 1, 1871, the plaintiff within sixty days thereafter commenced an action for the foreclosure of said mortgage, obtained a judgment therein, and sold the premises. There was a deficiency of one thousand six hundred dollars and eighty cents, for which judgment against Smith, the mortgagor, was entered, execution issued, and returned unsatisfied.

The principal defense was that there had been a prior default in the payment of interest, and an omission of the plaintiff to commence a foreclosure of the mortgage, within sixty days thereafter, which satisfied the guaranty, and the question arose upon the interest which fell due on September 1, 1870, which the defendant alleged was not paid until October 10, 1870. A brother of Smith, the mortgagor, testified that he gave his check dated October 10, 1870, on that day, for the interest due on September 1, but it was claimed by the plaintiff, that it was received in September, and post dated.

The question was submitted to the jury under an instruction from the court that if there was a default in the payment of the September interest until October 10, the defendant was exonerated.

The jury found for the plaintiff.

A motion for a new trial upon a case was made at special term and denied. Judgment having been entered, the defendant appealed from the judgment, and from the order denying a motion for a new trial.

Mr. Lipman, for appellant.

Mr. Bright, for respondent.

BY THE COURT.—MONELL, Ch. J.—Upon the mo-

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tion for a new trial, the question was presented of the sufficiency of the evidence, to sustain the finding of the jury, and upon the appeal from the order denying the motion, we are asked to examine the evidence, and see on which side the clear weight of it lies.

The motion in this case was made at special term, and not upon the minutes of the court, and is, therefore, not within the rule stated in *Rowe v. Stevens* (34 *Sup'r Ct. R.* 436), and *Carnes v. Platt* (36 *Id.* 361). We are at liberty, therefore, to look at the evidence, notwithstanding no request to the court to direct a verdict was made at the trial.

The question submitted to the jury was whether the interest due September 1, 1870, was paid within the thirty days allowed by the bond, and the question turns on the plaintiff's theory, upon whether the check of A. P. Smith, dated October 10, 1870, was a post-dated check, received before its date, and during September. The court instructed the jury if it was so received, and was received as payment of the September interest, it was sufficient to satisfy the condition of the guaranty.

There was nothing in the evidence, I think, to warrant any conclusion other than that the A. P. Smith check served to pay the September interest. Mr. Wandell, who held the bond and mortgage for the plaintiff, testified that the interest, which fell due on September 1, had been promptly paid, paid on September 1, in money—in cash. He afterwards qualified this, by saying it might have been paid by check, which he considered cash. This evidence, therefore, is insufficient to overthrow the very positive proof, that the A. P. Smith check was given and received for the September interest, and leaves the question of payment to be determined upon whether it was post dated, and received, in fact, prior to its date, and within the thirty days after the interest became due.

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The only evidence that the payment was within the thirty days, was that of Wandell, before alluded to, and which was, that it had been promptly paid on September 1, by money or check. The plaintiff offered no other proof, and there were no corroborating or other circumstances to satisfy or strengthen the proof that the payment was on that day.

Smith, the drawer of the check, was a witness for the defendant, and testified that he was a brother of the mortgagor; that the check was delivered by him on the day it bears date—October 10, 1870,—to either Peck or Wandell, the payees.

The check was endorsed "Peck & Wandell, per Jno. P. Kane." The witness says he paid the check at the office of Peck & Wandell to one or the other, in the presence of their book-keeper. The witness had no recollection of the day the check was delivered, apart from the day of its date written upon the check, looking at which enabled him to say it was delivered on the day of its date.

The following is some of his testimony :

Q. What day of the month was it that you paid the check ?

A. The 10th ; I saw by the check.

Q. Is that your only recollection ?

A. That is the means I have—the only means I have.

Q. That is all the means you have ?

A. Yes, sir.

Q. You have no recollection outside of that date ?

A. The check is all that guides me to the date of the payment.

Q. Have you any recollection whatsoever other than that afforded by this date on the check ?

A. That covers the date, do you mean sir ?

Q. Yes.

A. I have not.

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Q. You are not able to say, then, that it was paid on the 10th?

A. Nothing only from that.

Q. You have no impression whether it was paid on the 10th in fact, from recollection?

A. My impression is—I don't know that I have any impression about it really; I judged—that is my evidence—it satisfies my mind that I paid it then.

Q. That is not a precise answer to my question; I have a right, aside from this date, to know if you have any recollection of the fact of paying this check on the 10th?

A. I have not.

The stump of the check-book shows the date of the check October 10. There is a prior and three subsequent checks of the same date, to other persons. And one of October 11, between two of October 10.

Smith, the mortgagor, also testified that he accompanied his brother, the day the check was delivered, to the office of Peck & Wandell, and that it was the 10th day of October. This is some of his testimony:

Q. Now state to the jury how you know it was the 10th of October?

A. I know it by the check and by the stub of the check-book; that is the only means I have of remembering that day particularly.

Q. You have no other recollection of it whatsoever?

A. No other recollection; no, sir.

Wandell on being recalled said he had never seen the check until that day: that he had seen A. P. Smith at some time at his office. He was then asked:

Q. Did you on that occasion give any consent to extend the time for the payment of the interest due on September 1, or did you give any indulgence in that respect?

A. No, sir. I never received any check for the payment of interest in the month of October.

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He stated that Kane had authority to endorse checks for them that were intended for deposit, and that the check in question was endorsed by him and deposited to the credit of Peck & Wandell. He also testified that their book-keeper always received the interest and gave a receipt, and endorsed it upon the bond.

It seems to me upon all this evidence that the jury was not authorized to find that the check of October 10 was received on any day other than that of its date. It is evident that that check paid the September interest; and yet Wandell says he never saw it, and never received it; and if it is true that, as he says, the interest was promptly paid on September 1, then it was twice paid, unless the October check was received on September 1. But of that there is no proof. Wandell does not say so. On the contrary his whole testimony repudiates any such pretense, for he expressly says he "never granted any indulgence or any extension for the payment of the September interest." The book-keeper, who usually received the interest, and who may have received the check, and who might have told when it was received, was not called as a witness.

The evidence, therefore, of the check itself, with its date of October 10 unexplained, would be *presumptive* evidence that it was delivered on the day of its date, which presumption would need to be repelled by plaintiff, by proof that it was post dated. There is no such proof in the case.

The corroborative proof is also strong. The stump of the check and the testimony of the two Smiths, the fair weight of whose evidence, notwithstanding their want of personal recollection, is that the check was delivered on October 10.

Looking, therefore, at all the evidence and giving due weight to the fact that the Smiths had to refresh their recollections by looking at and being wholly guided by the date on the check, I am of the opinion

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that the clear weight of the evidence was with the defendant. A little evidence on the part of the plaintiff might have caused such a conflict as would have made it improper to disturb the verdict. But she gave none. The check, which was probably given to the bookkeeper, was presumptively, and according to the testimony of the two Smiths, delivered on the day of its date. This is not contradicted, except inferentially by Wandell, who says the interest was paid on September 1, but he also says there was no indulgence or extension. This evidence of Wandell, however, is so inconsistent with the uncontroverted fact that the interest was not paid until the check was paid,—although its prior receipt might operate as a payment for some purposes,—that he must have been mistaken in saying the interest was promptly paid on September 1.

The Smiths were disinterested. It was of no consequence to them, so long as the interest was paid, whether it was paid on September 1 or October 10, and there is nothing to discredit their testimony.

The foreclosure action of the second or guaranteed mortgage was quite unnecessary. The deficiency was found upon the foreclosure of the first mortgage, and the action upon the guaranty could have been maintained at once, without resort to the second foreclosure. But this only affects the amount of the recovery, which should be limited to the deficiency remaining after the receipt of the surplus moneys. In other words, the defendant should not be made to pay the costs of the second foreclosure suit.

I am of the opinion that the judgment and order should be reversed ; but as it is reversed solely on the *facts*, it must be on payment of the costs of the trial, in which event a new trial is ordered, but without costs of the appeal to either party.

SEDGWICK, J., concurred.

Statement of the Case.

THOMAS W. LADD, PLAINTIFF AND RESPONDENT,
v. JAMES ARKELL *et al.*, DEFENDANTS AND
APPELLANTS.

I. FACTOR, ACTION BY.

1. SET-OFF OR COUNTER-CLAIM, AGAINST.

- a. Where a factor (L.) entrusts goods of his principal (W.) to an agent (A.) for sale, such agent knowing that L. was the factor of W., A. *can not*, in an action against him by L. to recover the proceeds of the goods which had been sold by him, *set off* or *counter-claim* an individual indebtedness due from L. to him.

II. MEASURE OF DAMAGES.

1. WHEN CURRENT RATE OF EXCHANGE CAN NOT BE ALLOWED.

- a. When one consigns goods to a house here, to be sold in England through their house there, and the house there sells the goods at a certain price in the currency of England, but the house here refuses to pay over the proceeds in an action brought here by the consignor against the house here, current rate of exchange can not be allowed.

2. REDUCING THE VALUE OF A POUND STERLING INTO THE CURRENCY OF THE UNITED STATES.

- a. The *premium* of gold at some fixed *period* must be ascertained.

1. *What period should be fixed.*

- a. In actions on contract the time when the debt or demand became due and payable should be taken.

3. INTEREST IS ALLOWABLE, ALMOST AS MATTER OF RIGHT, FROM THE TIME THE DEBT OR DEMAND BECOMES DUE; *e. g.*, FROM THE TIME OF THE RENDITION OF ACCOUNT OF SALE.

4. *Application of above principles.*

- a. Plaintiff in the case at bar was entitled to have the sterling pound turned into gold at the time of the rendition of the account of sales at the rate of \$4.44 to the pound, then to have the currency value of gold at that time determined, and to recover the amount of such currency value, with interest thereon from that time.

Statement of the Case.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

The action was to recover the value or proceeds of a quantity of beef.

The complaint alleges that the plaintiff was a provision broker and commission merchant, and as such delivered to the defendants the beef in question, the property of one Wood, then in the hands of the plaintiff, for sale, and upon such delivery the plaintiff received from the defendants thirty-eight hundred dollars for the account of said Wood ; and thereupon directed the defendants to sell the beef, and to account to the plaintiff for the proceeds. That the defendants so received the beef from the plaintiff, and although they admit that they have sold it, have refused to account to the plaintiff therefor, or to pay over the proceeds to him, and "have wrongfully converted said property, or the proceeds of the sales thereof, to their own use, to the damage of the plaintiff of one thousand dollars."

The defendants by their answer allege, that the defendants being commission merchants "received from the plaintiff as his property, and to be sold by the defendants, for and on his account and benefit, and not otherwise," the beef in question.

The defendants further allege, that previously the plaintiff was a partner in the firm of Mitchell, Ladd & Co.; that said firm failed, owing the defendants a large sum of money ; that upon a compromise thereof, said firm gave their promissory notes for a portion thereof, which are due and remain unpaid, and which the defendants claim to set-off against the demand of the plaintiff.

The action was tried by the court and a jury.

The plaintiff testified, that he was a provision

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broker, and the defendants commission merchants and shippers; that he told the defendants that he was holding a lot of beef belonging to Wood, which he wished plaintiff to dispose of; that he wished to consign it for sale to the defendants' house, on the other side (*i. e.*, in England), and they agreed to make an advance on it of about half the value. They made the advance on it, and it was consigned to and shipped by the defendants.

Upon his cross-examination the defendants offered to show that the plaintiff was, at the time of the consignment, indebted to the defendants in the sum of fifteen hundred dollars. This was objected to and excluded. The defendants excepted.

An account of sales in England was rendered by the defendants, showing a balance unpaid on the shipment of one hundred and twenty-three pounds twelve shillings and ten pence sterling.

The rule adopted by the court for estimating the value, in the currency of the United States, of the English money, was to take the value of the English pound, in gold, at one hundred and nine—which included the current rate of exchange, nine per cent.—and the premium on gold, at the time the account was rendered, and then interest from that time.

The defendants objected to the rule. The court overruled the objection, and the defendants excepted.

No evidence in chief was offered by the defendants.

The defendants moved to dismiss the complaint on the ground, that the plaintiff had not shown that he sustained such a relation to the action as authorized a verdict in his favor in trover, or for conversion.

Plaintiff's counsel said that the plaintiff did not claim to recover in trover or conversion, but on contract.

Defendants' counsel also moved for a dismissal of the complaint, on the ground that the complaint was

Appellants' points.

in trover, or for conversion, and not on contract or for balance of account, and that there was an entire failure of proof of the cause of action alleged in the complaint; also on the ground that the plaintiff had no cause of action in himself, and no right to sustain the action.

That he had shown the right of action to be in Wood, and not in himself.

He had not shown that he had ever been in possession of the property; on the contrary, it had been proved to have been in Amelung's possession, with the warehouse receipt for it in possession of the Indemnity Company.

The motion was denied as to each ground severally.

The defendants' counsel excepted severally as to each ground taken by him on his motion to dismiss the complaint.

The court directed a verdict for the plaintiff.

Defendants' counsel excepted to the direction so given.

The defendants moved for a new trial, upon the minutes of the court, which was denied, and judgment was thereupon entered upon the verdict.

The defendants appealed from the order and judgment.

R. H. Huntley, attorney and of counsel for appellants, submitted points on the question as to whether the plaintiff could sue in his own name, which point was decided on a former appeal (37 *N. Y. Superior Court Rep.*, p. 35). On the present appeal, he cited the following authorities on this point: *White v. Chouteau*, 10 *Barb.* 202; *Buckbee v. Brown*, 21 *Wend.* 110; *Grunell v. Smith*, 10 *Sandf.* 706; 1 *Barb. Ch. Pr.* p. 39 (2d Ed.); *Rowland v. Phalen*, 1 *Bosw.* 43; *Brown v. Chary*, 56 *Barb.* 635. He further urged:—
I. The court erred in the rule of damages, both as to the

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exchange between America and Europe, and in ruling that the rule of damages was the difference between the values of currency and gold at the time of the transaction, rather than at the time of the trial. By such a rule, the plaintiff is largely over-paid. He was only entitled to gold, or its equivalent, at the time of trial (*Kellogg v. Sweeney*, 46 *N. Y.* 291; *Phillips v. Dugan*, 21 *Ohio St. R.* 466; *S. C.*, 8 *American Reports*, 66; *Trebilcock v. Wilson*, 12 *Wall.* 687; *Butler v. Herwitz*, 7 *Id.* 258; *Dewing v. Sears*, 11 *Id.* 379).

II. The court erred in excluding evidence offered by the defendants. It was proper to show that the plaintiff was indebted to the defendants. No ground of objection to the evidence is stated; and unless there is no view in which it could be admitted, the judgment should be reversed for that ground (*Wall v. Ellis*, 54 *N. Y.* 684).

The defendants insist on the objection heretofore made, that this is an action in tort, not contract, and that the plaintiff can not recover on the proofs. As this point was before ruled upon, it is not now argued.

James W. Culver, attorney and of counsel for respondent.

BY THE COURT.—MONELL, Ch. J.—The principal questions in this case were determined by the court upon the former appeal (37 *Sup'r Ct. R.* 35). It was there held, that a factor can sue in his own name. That the form of the complaint, containing allegations that were appropriate in an action for the conversion of the property, was immaterial, as a recovery in tort or on contract, according as to which was supported by the proof, could be had.

Those questions are, therefore, not open for review. Upon the second trial, the defendants attempted to prove their set-off against the plaintiff, and the

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court, very correctly, as we think, refused to admit the proof.

The evidence was uncontradicted, that the plaintiff was the mere factor of Wood, the owner of the property ; and that the defendants were so informed by the plaintiff before and at the time the consignment was made. Such proof effectually shut off all right of set-off against the plaintiff.

The same evidence sufficiently established, under the decision upon the former appeal, that the plaintiff could recover, without regard to the allegations in his complaint.

Such allegations were held to be sufficient, either upon contract or for conversion ; and it was for the court to determine upon the trial whether a cause of action, without regard to its form, had been made out.

There can not be a doubt, therefore, that upon the uncontradicted evidence, the plaintiff was entitled to a verdict for the balance of sales remaining unpaid.

The motion to dismiss the complaint was, therefore, properly denied.

The objection to the mode of ascertaining the damages presents a question upon which there is some conflict of decision.

The witnesses who estimated the value in the currency of the United States, added the current rate of exchange on London.

In *Martin v. Franklyn* (4 J. R. 124), and *Scofield v. Day* (20 Id. 102), the supreme court held, that the *par* and not the *rate* of exchange was recoverable. In the first case the action was to recover a debt contracted in England and payable in sterling, and in the other case it was upon a promissory note, made in Canada and payable in England.

These decisions have not been reversed in this state, but have several times been cited, and, as I think, sufficiently approved, to make them binding upon this

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court (see *Wilson v. Morgan*, 4 *Robt.* 73; *Schermerhorn v. Am. Life Ins. Co.*, 14 *Barb.* 156; *Curtis v. Leavitt*, 15 *N. Y.* 88; *Rice v. Ontario Steamb't Co.*, 56 *Barb.* 388).

In *Oliver Lee & Co. Bk. v. Walbridge* (19 *N. Y.* 136), the action was upon a promissory note discounted by the plaintiff's bank. The defense was usury; and it was alleged that in addition to deducting the interest, the bank had also deducted the current rate of exchange on New York.

Judge COMSTOCK, after alluding to the rule that the holder of a foreign bill is entitled, upon its dishonor, to recover the amount of exchange according to the prevailing rate, and that this is a general principle of commercial law in reference to foreign bills, as well as a regulation by the statutes of many of the states, says: "It can scarcely be said, however, that these doctrines form a part of the law merchant in regard to promissory notes and commercial balances of account, although due and payable in a state or country different from that where the debtor resides, and where the obligation is sought to be enforced. *On the contrary, in this state*, and in Massachusetts, it has been *distinctly* held that such debts are to be paid according to the *par* of exchange, and that the creditor is not entitled to any compensation for the difference of exchange between the country where the suit is brought, and the country where the debt was payable." And he refers to *Martin v. Franklyn*, and *Schofield v. Day* (*supra*), and to *Adams v. Cordis* (8 *Pick.* 260). But he says, "The opposite doctrine was, however, held in the federal circuit courts, by Justices STORY and WASHINGTON" (*Smith v. Shaw*, 2 *Wash. C. Ct.* 168; *Grant v. Healey*, 3 *Sumn.* 523).

Swanson v. Cooke (45 *Barb.* 574) was an action upon a judgment recovered in a British province, and the rule of the *par* of exchange was adopted. INGEBAM, J.,

says: "If the debt is for so many pounds sterling, the recovery can only be for that sum converted into dollars, at the rate which the pound sterling bears to a dollar, *without any regard to the rate of exchange* between the two countries."

In *Schermerhorn v. Am. Life Ins. Co.* (*supra*), the defendant had issued certificates payable in London in pounds sterling, and the court say (p. 157): "A pound sterling could be paid *here*, unless due on a dishonored bill of exchange, by \$4.44, *in our currency*," . . . and that the cases of *Martin v. Franklyn*, and *Schofield v. Day*, were direct authorities to show, that in this state the holders would recover no more than the value of the certificates at the rate of \$4.44 to the pound sterling, and the interest thereon. And he says the decisions were quoted with approbation, and adopted by the supreme court of Massachusetts (8 *Pick.* 287).

In the last case (*Schermerhorn v. Am. Life Ins. Co.*) a distinction, justified, perhaps, by the cases in the Federal courts, may be said to have been drawn between debts payable *here*, and such as by the terms of the contract are payable in *a foreign country*, although in that case the certificates were payable in London.

This distinction is clearly indicated in the two cases in the Federal courts, already cited, where Judge WASHINGTON, in one of them, says: "I take the general doctrine to be clear, that whenever a debt is made *payable in one country*, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to *replace the money in the country where it ought to have been paid*." And the same distinction is recognized by Mr. Justice STORY, in his *Conflict of Laws*, §§ 308, 309, 310, 311, &c.

In this case, the goods were delivered to the defendants in the city of New York, and by them forwarded to their branch house in England, for sale. An account

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of sales, in sterling money, was rendered to the defendants *here*, and it forms the basis of the damages which the plaintiff is entitled to recover.

The contract was made, and the debt was incurred, in this city. It was not incurred in England, and is not in any event payable there. And the debt or the judgment upon it, when paid, will not be, or have to be, transmitted to London, but will be retained here always. It is not, therefore, a case where, as was said in *Grant v. Healy (supra)*, the creditor is entitled to receive the full sum necessary to *replace* the money in the country where it ought to have been paid. And the error of the witnesses, doubtless, was in the theory that the money was not in New York, but in London, and had to be collected through or by a bill of exchange, or when collected here, had to be transmitted to London; neither is the case. The money remains here, paying a debt-due upon a contract made here and not elsewhere.

The only decision in this state adverse to the rule as stated in the two early cases of *Martin v. Franklyn* and *Schofield v. Day (supra)*, is *Ginteman v. Davis (3 Daly, 120)*, where the common pleas of this city held the *rate* of exchange was recoverable upon a British bill drawn on the defendant and accepted here. But I think that decision should not be followed, for the reasons already stated. The two cases referred to, have not only not been reversed, but have, as has been seen, repeatedly been recognized in this state as laying down the law correctly. Besides, the supreme court of this district, in a case between the same parties, cited in a note to *Swanson v. Cooke (supra)*, decided the other way, and held that upon a bill drawn abroad and made payable here, the holder could only recover the amount named in the bill, *without exchange*.

In reducing the value in coin of a sterling pound into the currency of the United States, the premium

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for gold at some fixed period must be ascertained, and to fix such period in this case is not without difficulty, and it is important owing to the large fluctuations in the premium, at different times.

At the trial the period was fixed at the time the account of sales was rendered and when the debt became due and payable.

In the cases arising under the legal-tender act of congress, when the contracts were payable in gold coin, the judgments were for the amount in coin (*Kellogg v. Sweeny*, 46 *N. Y. R.* 291; *Philips v. Dugan*, 21 *Ohio*, 466; *Butler v. Herwitz*, 7 *Wallace*, 258), which judgments could, of course, be satisfied by gold coin, purchased at the rate of premium existing at the time of payment, thus making a loss to the creditor of any larger premium, which might have existed at the time the contract matured.

But in this case the judgment could not be in coin, but must be in the lawful money of the United States, and whatever the decisions may be in respect to contracts payable in coin, a judgment for a certain number of dollars, can be satisfied by payment in the legal tender notes of the country (*Wilson v. Morgan*, 4 *Robt.* 58).

If the action could be maintained as an action for the conversion of the property, then it would have been proper, probably, to have allowed the highest value of gold, at any time after the conversion, to form the basis of converting the gold into currency as the damages (*Baker v. Drake*, 53 *N. Y. R.* 211). But this is an action upon contract, upon which the plaintiff almost, it may be said, as an absolute right, is entitled to recover interest as damages, from the time the debt became due, which in this case was at least on June 2, 1866, when the defendants rendered their account of sales.

In *Baker v. Drake*, *supra*, the court states the

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rule of damages thus broadly: "The rule of damages should not depend upon the form of action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured; and the answer to that inquiry can not be affected by the form of the action in which he seeks his remedy."

The plaintiff was entitled to payment on the day the debt was due. Had it been paid on that day, the amount or value of the sterling pound would have been ascertained at the then current rate of gold, and I can see no reason why the plaintiff may not claim that it shall be so estimated now. In no other way would he be adequately indemnified.

In sales of personal property a vendee who sues for a non-delivery, may recover the increased value which may have taken place at any time intermediate the purchase and bringing the action (*2 Pars. on Con.* 480). This, of course, includes the value of the property at the time of sale.

So, in a written promise to pay in specified goods the rule of damages, it seems, is the price at the time of the breach (*2 Pars. on Con.* 490).

In analogy to these cases, and upon the same principle, the plaintiff in this case was entitled to have the sterling pound turned into gold at the time the debt became due; and the currency value of gold at that time, and interest thereon, is the correct measure of damages.

As the only error was in adding the exchange, that can be deducted from the recovery without sending the case back for a new trial, as there is enough in the evidence to enable us to correctly state the amount.

The damages for which judgment should have been

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entered are twelve hundred and six dollars and thirteen cents.

The judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event, unless the plaintiff elects to deduct from the judgment the sum of one hundred and two dollars and ninety-one cents, when the judgment as reduced should be affirmed, with costs.

SEDGWICK, J., concurred.

HENRY WEHLE, PLAINTIFF AND APPELLANT, v.
THE BOWERY SAVINGS BANK, DEFENDANT
AND RESPONDENT.

I. JUDGMENT, VACATING.

1. DISCRETIONARY.

a. So far as that an order of vacatur will not be reversed unless there was an *unmistakable abuse of discretion*.

1. What does not show such abuse.

II. SUBSTITUTION OF PARTY DEFENDANT.

1. Costs.

a. When the order of substitution gives the defendant the costs of action, he is entitled to such costs as the Code prescribes.

1. The question as to whether the order should have given costs can be *raised only on appeal from the order itself*.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Statement of the Case.

Appeal from an order vacating a judgment, and from an order affirming a taxation of costs.

The defendant on March 12, 1875, made a motion for the substitution in its place as defendant of one Peter Weis. The motion was decided on the 15th, and was granted. On the 17th plaintiff obtained an order requiring the defendant to show cause, on the 18th, why the motion should not be re-argued. On the 19th the motion for a re-argument was denied with ten dollars costs of motion, and an order to that effect was entered on that day. On March 20th both defendant and plaintiff handed up orders proposed by them respectively to be entered on the decision of the motion for substitution. On the 22nd the judge settled the order, and the same was entered on that day. The order as thus settled, bore date in its caption as of March 12th (the date of the argument of the motion), and ordered that the said Peter Weis be substituted as defendant in this action in place of the Bowery Savings Bank, and that the said The Bowery Savings Bank deposit the amount claimed in the summons herein, less its costs herein to be taxed by the clerk of this court, in United States Trust Company, and that the said The Bowery Savings Bank be and it hereby is discharged from all liability to either party; and that the said Peter Weis have twenty days after the service of the order within which to plead, and that the prevailing party recover the above costs.

This order was not served on plaintiff's attorney until April 2, 1875. On the 23rd of March, after the entry of said order, dated March 12th, but before its service on the plaintiff's attorney, plaintiff's attorney entered judgment by default against defendant. The judgment roll contained, so far as the appeal book shows, no proof of the service of the summons and complaint on the defendant, and the only proof contained therein

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of the defendant's time to answer having expired, and of no answer having been served, was this:

"CITY AND COUNTY OF NEW YORK.

in the above action, being duly sworn, *says* that no answer or demurrer has been received or served in pursuance of the requirement of the summons in said action.

Sworn to before me, this 23d } CHAS. GOLDZIER.
day of March, 1875.

HENRY FUEHRER,
Notary Public,
Kings County."

On April 5th, 1875, the deposit required by said order dated March 12th, was made.

On April 5, 1875, defendant taxed its costs under said order dated March 12th, and the order denying the motion for re-argument. The costs as taxed were, twenty-five dollars for costs before notice of trial, and ten dollars costs given by the order denying the motion for a re-argument.

Plaintiff moved for a re-taxation, which was denied, and from the order entered on such denial he appeals.

On April 8th defendant noticed a motion to set aside the judgment entered March 23d, specifying in the notice various grounds of irregularity. The motion was granted, and from the order entered thereon the plaintiff appeals.

Simon Sullan, attorney, and *Henry Wehle* of counsel for appellant.

Norwood & Coggeshall, attorneys and of counsel for respondent.

BY THE COURT.—MONELL, Ch. J.—Apart from the irregularities in the entry of judgment in this case, of which there are several, the power of the court to va-

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cate a judgment is so far discretionary, that it must be a case of unmistakable abuse of such discretion that will lead the appellate court to reverse an order setting the judgment aside.

No such abuse of the power appears in this case.

The order should be affirmed, with costs.

In respect to the appeal from the taxation of the defendant's costs upon the order substituting Weis as defendant, the only question is as to the items taxed. The order does not appear to have been appealed from, and as it gives to the Bowery Savings Bank its costs in the action, to be taxed, we are, as the court below was, concluded by it, and can not inquire whether they should have had costs or otherwise.

The item of twenty-five dollars before notice of trial, is the fee prescribed by the Code, and the ten dollars costs of opposing motion for a re-argument, was given by the order denying the motion.

The decision below was correct, and the order should be affirmed, with costs.

SEDGWICK, J., concurred.

Statement of the Case.

JAMES V. SCHENCK, SURVIVOR, &c., PLAINTIFF
AND RESPONDENT, v. THE MAYOR, &c., OF THE
CITY OF NEW YORK, DEFENDANT AND APPEL-
LANT.

L. MUNICIPAL CORPORATIONS.

1. SUPERVISORS OF THE COUNTY OF NEW YORK.

a. *County Jails, power as to furnishing.*

1. Has power to provide suitable furniture, such as bedsteads, mattresses, and bedding.

1. *Ludlow Street Jail* is the county jail of the county of New York.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

The action was to recover for merchandise sold and delivered. The action was tried by a referee, who found the following facts :

That between September 21, 1869, and December 9, 1871, the firm of Schenck & Ryan sold to the then existing Board of Supervisors of the county of New York, and that said Board of Supervisors purchased of said firm, certain goods, wares, and merchandise, consisting of bedsteads, mattresses, and bedding. That said goods, wares, and merchandise were, by the directions of said Board of Supervisors, delivered by said firm at the county jail of said county of New York. That said goods, wares, and merchandise were reasonably worth the sum of two thousand eight hundred and ninety-eight $\frac{10}{100}$ dollars. That no part of said sum of two thousand eight hundred and ninety-eight $\frac{10}{100}$ dollars

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has been paid to said firm, nor to anyone for or on their behalf.

The referee gave judgment for the plaintiff, and the defendant appealed.

Wm. C. Whitney, counsel to the corporation, and *James C. Carter*, of counsel for appellant, submitted a full and exhaustive brief, claiming, among other things, that the Ludlow street jail was not a county jail, and that the county was not bound to support or provide beds and bedding for the prisoners there confined.

A. C. & H. Ellis, attorneys, and *Adam C. Ellis*, of counsel for respondents, submitted an elaborate brief.

BY THE COURT.—MONELL, Ch. J.—The liability of the city of New York in this action, depends solely upon the liability of the county prior to the passage of the consolidation act (chapter 304, of *Laws of 1874*), and the question is, Had the supervisors of the county authority to make the purchase?

By statute, the jails of counties generally are put into the custody of the sheriffs (1 *R. S.* 380, § 75), and especially the jail in the city of New York, used for the confinement of persons committed on civil process only, is confided to the sheriff of that county (*Ibid.*). And by another statute, the building used as such jail is designated as the jail of the city and county of New York, for the confinement of such persons (2 *R. S.* 446, § 12). It is made the duty of the supervisors of counties, other than New York, to cause court-houses and jails, poor-houses, clerks' and surrogates' offices, and other public buildings of their respective counties, to be erected (*Laws of 1849*, ch. 194), yet there is no provision or express authority to do more than to cause

the *erection* of such buildings, except in respect to court-houses, where provision is made for furnishing fuel, lights, &c. (*Code*, § 28).

There is no *express* provision, that I am aware of, from which the supervisors of a county can derive an authority to do more, in respect to a county jail or other county buildings, with the exception referred to, than to cause their erection. Their authority, therefore, to furnish and maintain such buildings must be derived, if found at all, from the incidental powers given to them.

Among the general powers given to boards of supervisors (1 *R. S.* 364, § 1), is (sub. 4) to make such orders for the disposition, regulation or *use* of the corporate property of the county, as may be deemed conducive to the interests of its inhabitants; and while confining such powers to such as are enumerated, they are given all such other and further powers "as shall be necessary to the exercise of those so enumerated" (*Id.* § 2). And further (*Id.* 367, § 4, sub. 1), to make such orders concerning the corporate property of the county, *as they may deem expedient*.

The supervisors of the county of New York—whether consisting of the mayor, recorder and aldermen, or of a separate body, is immaterial—have vested in them all the powers and duties which attach to the office by the laws of the state (1 *R. S.* 368, § 17).

The statutes referred to, confer, it appears to me, all requisite authority, as included in and incidental to the general power, to supply all public buildings with all things required for their comfortable and convenient use.

Thus desks and chairs in a court room—not enumerated in the statute (*Code*, § 28)—doors, locks, and fuel, in a jail; the necessary furniture for a county poor-house and the like, come within the powers necessary to the exercise of those which are enumerated.

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A like power, is, I think, incidental to the supervisors, who have power to make such orders concerning the property of the county, as they may deem expedient.

It is not suggested in this case that the articles furnished to the county jail, were purchased at an unreasonable price. The defense on the part of the city, is upon the ground, chiefly, that the debt incurred was not a county charge, which included the objection that the articles were not *necessary*, and, therefore, that the supervisors were not bound to furnish them.

If I have shown, as I think I have, that the purchase was within the general powers of the supervisors, or within powers incidental to such general powers, I think I need not occupy much time in disposing of the other question. To claim that beds and bedsteads and bedding are not suitable and proper, if not, indeed, necessary, for persons confined in a *debtors' jail*, who have committed no crime, and especially of witnesses detained to give testimony, is inconsistent with the humanitarianism of the present time, if not a return to the rigor of the old law, when a poor defendant was dealt with more as a criminal than as an unfortunate debtor.

I think the judgment should be affirmed.

SEDGWICK, J., concurred.

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EDWIN L. BUTTERFIELD, PLAINTIFF, v. WILLIAM RADDE, DEFENDANT.
SELCHOW, PLAINTIFF, v. RADDE, DEFENDANT.

I. RE-ARGUMENT.

1. WHAT NOT SUFFICIENT GROUND FOR.

a. That after the affirmance by the general term of a judgment in favor of plaintiff, *the court of appeals, without writing any opinion, or assigning any reason therefor, has reversed a judgment in favor of a different plaintiff in another action against the same defendant, involving the same facts and dependent on the same law as the action in which the re-argument is sought, involves and depends on, does not furnish sufficient ground to call for a re-argument on defendant's application.*

2. STIPULATION AS TO SEVERAL PENDING CAUSES.

a. *Effect of.*

A stipulation that the verdict to be rendered in a cause on trial shall control and be conclusive in certain other causes, and that judgment be entered in such other causes accordingly, and that the same evidence, ruling, exceptions, and charges, shall be considered as inserted in such other cases as are in the cause on trial, and shall be as of record in all the causes, in terms applies to the trial only, and its force and effect is spent with the verdict.

Therefore *the fact* that the judgment entered on a verdict for plaintiff in one of the causes mentioned in the stipulation has been reversed in the court of appeals, does not of *itself* entitle the defendants in the other actions to a reversal of the judgments, and *consequently not to a re-argument.*

BUT

the *spirit and intent* of the stipulation, was substantially that the untried actions should abide the event of the one which was tried, and therefore under it the defendants in those actions are fairly entitled to obtain the benefit of the decision of the higher court in the case which has been decided there, and as on a re-argument they may satisfy the court that its former decision has been reversed, or is incorrect, and thus get the benefit of the decision of the higher court, *a re-argument should be granted.*

Statement of the Case.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Motions for a re-argument of an appeal.

There were three cases pending against the same defendant, involving precisely the same questions of law and fact. All the cases being at issue and ready for trial, the attorneys made the following stipulation :

“Edwin L. Butterfield against William Radde.” It is hereby stipulated and agreed by the respective attorneys, that the verdict to be rendered in this cause now on trial . . shall control and be conclusive in the two following cases . . involving the same questions, to wit: “Mallory v. The same defendant, and Selchow v. The same defendant; and that judgment be entered accordingly; and that the same evidence, rulings, exceptions, and charges shall be considered as inserted in the same two cases as are in the above entitled cause, and shall be as of the record in all three of these causes against Radde.”

The trial of the Butterfield suit resulted in a verdict for the plaintiff; whereupon, under the stipulation, judgments were entered in the three suits respectively, for the plaintiffs therein. Appeals were separately taken from the judgments to the general term of this court, where all the judgments were *affirmed*. An appeal was thereupon taken in the Mallory case, to the court of appeals—the other two judgments being under five hundred dollars, permission to appeal was refused—and in that court the judgments of the general and special term of this court were reversed. In the meanwhile, the two judgments not appealed from, were collected by the plaintiffs therein.

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No opinion was written in the court of appeals, nor is it known upon what ground or grounds the judgments were reversed. The attorney opposing this motion, however, stated in his affidavit, that the clerk of the court of appeals informed him "that there was a dissenting opinion concurred in by *three* judges, and no prevailing opinion, but finally it was announced that there would be no opinion at all." This is not denied.

D. C. Calvin, for the motion.

C. M. Earle, opposed.

BY THE COURT.—MONELL, Ch. J.—The stipulation made by the attorneys, *in terms*, applied to the *trial* of the actions only. After verdict separate judgments were to be entered, and thereafter separate proceedings were to be had. Accordingly, separate appeals were taken to the general term, where separate judgments of affirmance were entered.

There is nothing, therefore, in the expressed terms of the stipulation—the office and effect of which was spent with the verdict—which can add force to the plaintiff's motion.

These motions are addressed to the sound discretion of the court. They can not be claimed as a right.

One of the grounds upon which the motion is sometimes granted is, that since the decision, the court of appeals has decided adversely to this court, the precise question involved. In such a case the court, in the exercise of its discretion, will save the party the labor and expense of going to the higher court to correct what we must in that case assume to have been an error of this court.

Thus in *Hayner v. American Popular Life Insurance Co.* (36 *Superior Ct. R.* 211), having followed and

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relied on a case which was reversed by the court of appeals, this court granted a re-argument, on the ground that that decision should be regarded as *stare decisis*. In that case, however, no judgment or order had been entered in this court, the decision having been merely announced; and besides the decision of the court of appeals had actually been made, although not known, at the time of the argument of the appeal in this court.

In the *Hayner* case, the court had before it the *opinion* of the court of appeals in the other case, and was able to see the grounds of the decision; and they found them to cover all the questions in the case in this court.

In the case before us we have not been furnished with any opinion of the appellate court. Indeed, it is stated that no opinion was filed or written. Nor are we apprised of the ground or grounds upon which that court has placed its decision. It may have been upon a purely technical ground, not disturbing the general law of the case, as determined by this court, and not affecting the real merits of the controversy, or it may even have been a reversal by the default of the party.

We have merely the fact, that one of three cases, involving the same facts, and of course dependent upon the same law, has been reversed by the court of appeals. But we are not bound to *assume* that the mere reversal of a judgment of this court necessarily reverses all the law of another case, as announced in the opinion of this court. It is doubtless the law of the case decided in the court of appeals; but so are the decisions in the other cases by this court the law of such cases, until they, or the principles involved in them and decided, are reversed in the same or some other case by the higher court.

What will occur upon a re-argument? This court

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will be asked to reverse its former decision, for the mere reason that the appellate court had in one of the cases reversed the judgment of this court, and as the three cases are identical in facts and law, the two remaining cases should suffer the fate of the one. But I think this court will require something more than a bare reversal of its judgments without the assignment of any reason therefor, to feel bound to recede from its own views of the law. If reasons had been assigned by the higher court, and they showed that the law of this court has been disturbed and reversed, we must and would regard the decision as authoritatively binding upon us. But if no reasons are given, this court would have a perfect right to adhere to its own opinions of the law, and the mere reversal by the appellate court, would and could have no influence upon it.

In the re-trial of the case reversed, what guide will the trial judge have? The grounds of the reversal are not known, and the supposed or conjectured errors of the former trial are not pointed out. I see no other guide, then, than the decision of this court, where the law of the case remains.

It is something, perhaps, of a hardship that the law of 1874, disallowing appeals when the judgment is less than five hundred dollars, has prevented the defendant from obtaining a reversal of the two other judgments. But that law was enacted for a proper purpose, and its effect upon the defendant in those cases, is the common effect it was intended to have upon all similar cases. The defendant is no exception, and this court to which he applied for permission to appeal, evidently thought he had no substantial grounds therefor.

But we think the spirit and intent of the stipulation was, substantially, that the untried actions should abide the event of the one which was tried, and that the court, so far as it can properly do so, should assist

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the defendants in those actions in obtaining the benefit of the decision of the higher court, in the case which has been there decided.

We think, therefore, that they should be permitted to re-argue their respective appeals, and if upon such re-argument they can satisfy the court, either by furnishing the reasons for the court of appeals decision, or in any other manner, that its former decision has been reversed, or was incorrect, they will get the benefit, which we think, under their stipulation, they are fairly entitled to.

This will leave the question where it should be, with the court upon a re-argument of the appeals, when possibly more light may be furnished, than is given us on this motion.

Motions granted, but without costs.

SEDGWICK, J., concurred.

Statement of the Case.

WILLIAM G. HALPIN, PLAINTIFF AND RESPON-
DENT, v. THE THIRD AVENUE RAILROAD
COMPANY, DEFENDANT AND APPELLANT.

I. MOTION FOR A NEW TRIAL ON THE MINUTES AND AP-
PEAL FROM AN ORDER ENTERED THEREON.

1. WHAT MAY BE CONSIDERED ON.

(a) Where there is *no conflict in the evidence* the question whether it is sufficient to support the verdict is *one of law, and may be considered* on such motion, and, if found insufficient, a new trial should be granted.

1. This *although the point was not raised on the trial*, either by a motion to dismiss or by motion for a direction of a verdict. *

Sembla. All questions that can be raised on a motion for a new trial made on a case at special term, and on an appeal from an order entered thereon, may be raised on a motion for a new trial made on the minutes and on appeal from the order entered thereon; *and nothing further is requisite to raise the questions in the latter mode, than is required in the former.*

II. NEGLIGENCE, CONTRIBUTORY.

1. WHEN QUESTION OF LAW.

(a) Where there is *no conflict* in the evidence bearing on this issue, the question is one of law and not of fact. †

* This overrules so much of the cases of *Rowe v. Stevens* (84 N. Y. Sup'r Ct. R. 436), and *Carnes v. Platt* (86 Id. 361), as holds to the contrary.

† In *Morrison v. Erie Railway Co.* (56 N. Y. 302), the learned judge in delivering the opinion of the court, on p. 307, says: "In this case, there are certain facts as to which there is and can be no dispute; and they are of such character and weight, that it is for the court to say, whether there is room for doubt and query, but that there was a complete absence of that care and prudence without which in the direction of conduct, there is negligence." And further on the question is asked, "Can it be said that a person of ordinary prudence would," &c. And the query is answered, "I think not. And I am of opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury."

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III. STREET CARS, GETTING ON.

1. CONTRIBUTIVE NEGLIGENCE.

(a) Crossing tracks.

Plaintiff hailed a car going up when it was about seventy-five feet below the upper street crossing; at this time a car, then about one hundred feet off (which he saw), was rapidly approaching on the down-track; he crossed the down-track, and

It would seem from this that the question as to whether there was "room for doubt or query," was one of law and not of fact; for if of fact, then it was for the jury to determine, and they having determined that there was no room for doubt or query, it is difficult to see how the court of appeals could reverse such determination.

The question then being one of law, it results that the court determined that the given state of facts appearing in that case established as matter of law contributory negligence; and necessarily held that the question, whether a given state of facts established contributory negligence was a question of law.

The correlative proposition, viz., that the question whether a given state of facts establishes absence of contributory negligence is a question of law, was not necessarily involved; and there are some expressions in the opinion which may indicate that there is some difference between the two propositions. It would seem, however, to naturally flow from the proposition which was decided. For, if in a given state of facts it is a question of law as to whether there is "room for doubts or query, but that there was a complete absence of that care and prudence, without which in the direction of conduct, there is negligence;" it would seem to follow that on a given state of facts it is equally a question of law as to where there is room for doubt or query, but that there was a complete presence of that care and prudence, which in the direction of conduct relieves a party from the charge of contributory negligence.

The observation on page 306, "that it is not sound to select one prominent and important fact which may occur in several cases, and to say that being present, there must as matter of law have been contributory negligence," does not militate against the views above expressed. If a case should arise *quatuor pedis* with *Morrison v. Erie Railway*, the court would certainly be obliged to follow that case, and hold the plaintiff as matter of law charged with contributory negligence. So, if there were some differences between the details of the two cases, it would seem that the determination as to whether the differences were substantial or immaterial would be a matter of law for the court to determine.

Statement of the Case.

when he reached the space intervening between the two tracks (which was barely, if at all, sufficient to allow of standing there in any safety), he stood there waiting for the up-car to stop, which it did about seventy-five feet above the said upper crossing; its platform was crowded, which he knew; while in the act of getting on its platform the horses of the down-car having been pulled by the driver into this space, knocked him down,

HELD,

As matter of law contributory negligence.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from a judgment and order.

The action was to recover for personal injuries to the plaintiff, caused by the alleged negligence of the defendants.

The plaintiff testified that himself and another person left Sweeny's Hotel about six o'clock of the afternoon of June 3d, and hailed a Third avenue car that was going up-town; the car stopped, and we passed across the street to get on the rear platform. The other gentleman in front of me was partially upon the step, and I was as close to him as I could stand, when the car coming down-town came up even with the one we were getting on, and the horse which was running between the two tracks struck me on the left shoulder, and knocked me under his feet in on the track, and walked over me; the platform of the car coming down town struck me on the right shoulder; my head was badly cut, and my ribs were bruised from the hip up to the shoulder, and the shoulder bone was broken. I was taken out from between the horses' feet and the platform of the car, and carried into Sweeny's Hotel. There was a space between the tracks (the up and down-town tracks) of four or five feet (proved by actual

Statement of the Case.

measurement to be four feet six inches to five feet, varying at different points). The horses that struck me must have stepped almost the whole distance between the tracks and eastward of the east line of the down-track. I was as close up to the gentleman on the step of the other car as possible. The gentleman who was with me was just before me, and he was partially up on the step, and I was as close to him as I could stand, in order to let the other car pass, and I noticed there was ample room for me to stand there. I was very careful to get as close to the other car as possible. When I hailed the car, it was a little south of the north crossing. I saw horses attached to the car coming down, but I paid no special attention to them. I am sure I attempted to get on the rear platform.

A witness for the plaintiff testified, they (plaintiff and the person with him) hailed a car directly opposite the door (of Sweeny's Hotel). The car stopped, and when the horses of the car going down came opposite to those of the up-town car, the driver pulled the reins, and threw the horses out into the space between the two tracks, and before the plaintiff could get his foot upon the platform the horses knocked him. One of the gentlemen was on the rear platform absolutely. It was somewhat crowded, and the plaintiff had hold of the iron railing getting on the platform. He was as close to the car as a man could be not to step on the car. There was nothing to obstruct the view between the plaintiff and the driver of the down car.

On his cross-examination he testified that the car going up had got about seventy-five feet beyond the corner or upper crossing. "I had been detaining the plaintiff, and was asking him some questions, and that detained him a moment or so after the car was hailed."

Another witness for the plaintiff testified that by measurement, the space between the inner rails of the two tracks is from four feet six inches to five feet; it

Appellant's Points.

varies occasionally ; the cars are seven feet wide, and overhang the rails on each side almost one foot three inches, leaving the actual space between two passing cars of only thirty inches. There was no difficulty in the way of free passage of the cars without striking me, when I stood between the two passing cars.

There was evidence on the part of the defendants that the plaintiff came rushing across the track to get in the up-town car, and was trying to get on the front platform.

The plaintiff further testified : "I went straight across the street to the rear platform. I did not catch hold of the railing, and had one foot on the step. Captain Moriarty, who was in front of me, got hold of the railing. I stepped as close to him as possible, until I was knocked down by the horses."

Defendant made no motion to dismiss the complaint, and no motion that the jury be directed to render a verdict in its favor.

The court charged the jury, that if the negligence of the plaintiff *in any way* contributed to the accident or to the injury sustained by him, he could not recover.

The jury gave the plaintiff a verdict.

A motion was made on the judge's minutes for a new trial, on the ground of insufficient evidence to support the verdict, which was denied, and an order to that effect entered. Judgment was entered in conformity with the verdict. Defendant appealed from the judgment and the order.

Brown, Hall, & Vanderpoel, attorneys, and *A. J. Vanderpoel* and *Mr. Greene*, of counsel for appellant, urged, among other things : The verdict is clearly against the weight of the evidence. It can only be sustained on the ground that the accident was occasioned solely by the neglect of the defendants (*Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 *N. Y.* 248). The evidence

Respondent's Points.

on the part of both the plaintiff and defendants clearly showed that the accident was not occasioned solely by the negligence of the defendant's servants.

P. O'Beirne, attorney, *Wm. H. O'Dwyer*, and *Algernon S. Sullivan*, of counsel for respondent, among other things, urged:—I. The exception taken to the judge's refusal to charge as requested by the defendant's counsel, is not well taken. The court may refuse to charge the jury as requested by a party, for the reason that he embraced within his charge already made, all the subjects contained in the request (*Osborn v. Gantz*, 38 *Sup'r Ct.* 148). The court in the general charge, clearly and distinctly included the propositions here made, as far as it was proper to be done. The refusal to charge, in the form requested, was correct; the subject-matter was one upon which there was conflicting testimony, and it was for the jury to determine the fact from the evidence before them. The question of negligence should be submitted to the jury, if there be conflicting evidence, or if the proofs leave the matter in doubt (4 *Abb. Dig.* 179). There is no error in refusal by the court to specify a fact alleged to be evidence of negligence, and to direct the jury to find a verdict on that fact for defendant. It is proper to leave it to the jury, with general charge (*Baxter v. Second Ave. R. R. Co.*, 30 *How.* 222).

II. There is sufficient evidence. There is a conflict of evidence. In cases where there is a conflict of evidence, "the well-grounded rule that upon such evidence the verdict of a jury is conclusive, is applicable, and leads to an affirming of the order denying the motion for a new trial" (*Knapp v. Roche*, 37 *Sup'r Ct. R.* 395; *The Fisk Pavement and Flagging Co. v. Evans*, *id.* 482; *Murphy v. Boker*, 3 *Robt.* 1; 4 *Abb. Dig.* 141; *Lewis v. Blake*, 10 *Bosw.* 198; *Cothran v. Collins*, 29 *How.* 155; 6 *Abb. Dig.* 404, §§ 51, 52, 53).

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BY THE COURT.—MONELL, Ch. J.—The appeal from the order denying the motion for a new trial authorizes an examination of the evidence to determine its sufficiency to sustain the verdict.

The jury have found there was no contributive negligence of the plaintiff. The question was submitted to them as one of the facts which they must find favorably to the plaintiff, to authorize a recovery; and having so found, their verdict should not be disturbed if there is any evidence to support it, or if the evidence on that subject was at all conflicting.

If, however, there is no conflict in the evidence, then its sufficiency is no longer a question of fact, but becomes a question of law, to be determined by the court, and needs not the intervention of a jury.

Had a motion been made at the trial to dismiss the complaint, on the ground that the plaintiff had not shown himself to have been so free from fault as the law requires, it would have been competent for the court, and its duty, to have examined the evidence and determined the question.

So, if the court had been satisfied that the plaintiff had failed in his evidence in respect to this affirmative issue, it would have been proper to have directed a verdict for the defendants.

But it is not too late to move, either at special term on a case, or upon the minutes of the court, to set the verdict aside, whenever any affirmative issue has been found upon insufficient evidence, or against the clear weight of evidence (*Allgro v. Duncan*, 24 *How. Pr. R.* 210). And if the motion is denied, an appeal lies from the order to the general term (*Code*, § 349, sub. 2), where the sufficiency of the evidence becomes a question for the court, and its decision is final (*Vermilyea v. Palmer*, 52 *N. Y.* 471).

The court in thus reviewing the evidence determines as *matter of law* whether it is sufficient, and so far it

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becomes a question of law. Nor does its submission, as a question of fact to the jury, deprive the court of its revisory power; but in any stage and in any of the forms prescribed by law, it may examine and weigh the evidence and determine its sufficiency. And where the evidence is undisputed its sufficiency may be made wholly a question of law.

In *Morrison v. Erie Railway Co.* (56 *N. Y. R.* 302), the court says (p. 307) "in this case there are certain facts, as to which there is and can be no dispute; and they are of such a character and a weight, *that it is for the court to say* whether there is room for doubt or query, but that there was a complete absence of that care and prudence, without which in the direction of conduct, there is negligence." And in *Reynolds v. N. Y. Cen. & H. R. R. Co.* (58 *N. Y. R.* 248), it is said (p. 250), "that either by direct proof given by the plaintiff, or from the circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault which contributed to the accident, or the action can not be maintained. If this element is wanting in the case, the court may non-suit or *set aside a verdict for the plaintiff*."

The affirmative of the issue of contributive negligence is upon the plaintiff, and when the evidence is closed and given to the jury, it must be sufficient to support an affirmative finding (*Squire v. Cen. Pk. N. & E. R. R. Co.*, 36 *Sup'r Ct. R.* 436, where at page 447, the cases are collated).

Courts can not and will not measure the degree of negligence. It is impossible to say whether the greater negligence of one party has contributed more than the lesser negligence of the other to the injury received. Hence the rule so long and securely established, holds the injured person to an absolute freedom from fault. If in any, the smallest degree, he by his act or con-

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duct, or by omitting to exercise his faculties, or to adopt the precautions which the occasion demands, brings upon himself the injury, the law affords him no remedy, however negligent may be the other party.

There is also another rule equally fixed, namely, that it does not require direct and positive proof that the injured person, was without fault. It may be established by circumstances, and even sometimes inferred from the disposition of men to keep out of difficulty (*Johnson v. Hudson R. R. Co.*, 20 *N. Y. R.* 71; *Warner v. N. Y. Cen. R. R. Co.*, 44 *Id.* 465, 481).

And a further rule is that the facts and circumstances must be *relatively* considered as they vary infinitely and always affect and more or less control each other. Each must be duly weighed and relatively considered before the weight to be given to it is known (*Morrison v. Erie Railway Co.*, *supra*).

In reviewing the evidence in this case in the light of the principles of law which I have stated, it seems to me impossible to say, that the plaintiff did not in some degree—small it may be, yet enough to defeat a recovery—contribute, by his own negligence, to the injury for which he seeks redress.

This must be established by undisputed evidence.

We will take the plaintiff's statement, and the other evidence he furnished.

The hour was six of a June afternoon, and consequently light. The plaintiff came out of Sweeny's Hotel—which is on the north side of the street—in company with another. He was detained in conversation after hailing an up-going car. To reach the car from the side of the hotel, he had to cross the down-track of the defendant's road, upon which a car was approaching, and then some two hundred feet away, and which he saw. He attempted to get upon the car from between the tracks, standing there, while the down-

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coming car was passing over a space of two hundred feet.

The space between the tracks was only five feet, and between the sides of passing cars, only thirty inches, a space barely sufficient, if, indeed, it was sufficient, to allow of standing there in any safety. The plaintiff hailed the car when it was seventy-five feet *below* the upper crossing, and it stopped about seventy-five feet *above* the upper crossing. While passing over this one hundred and fifty feet, the plaintiff was either approaching the car across the down track, or standing between the tracks. The rear platform was somewhat crowded. The person accompanying the plaintiff had gotten upon the platform, and the plaintiff had one foot upon it when he was struck. Both were endeavoring to get upon the platform from between the tracks; the car had stopped; Moriarty had succeeded, and put himself out of danger; the plaintiff failed to reach a place of safety.

The question is, Does not this undisputed evidence establish most clearly that the plaintiff, in attempting to get upon the up-going car, from the side of the street, in the manner and under the circumstances, did not exercise that common care and prudence which an ordinarily careful and prudent man would have exercised?

It seems to me, it does not admit of doubt. He approached the car from the dangerous side of the street. He had to pass over the down-track, upon which a car was rapidly approaching. Instead of crossing the up-track to the opposite side of the street, where he could safely have awaited and entered the up-going car, he stopped between the tracks, with an intervening space of only thirty inches between the car he designed to enter and the car upon the other track. He saw the platform was crowded. He was behind his companion, and yet with the impending danger from the approach-

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ing car, he remained in this situation of peril until the horses struck him.

There was no evidence that Chatham street, at the place of the accident, is a very crowded thoroughfare; and I suppose we can not take judicial cognizance of a fact so well-known to us all. But, as a matter of every-day observation, it is not safe or prudent, in any of our business streets or avenues, to get upon a street-car from between the tracks, or from the opposite side of the street. Common prudence, and a proper regard for personal safety, should dictate that cars, in such crowded places at least, should be taken from the side of the street the least liable to expose the passenger.

It has long been a rule applied to cases of injury by steam railways, that a person approaching the railway, must use all his faculties, as well as every reasonable precaution, to discover the approach of a train. He must listen and look up and down the track, and approach the crossing with caution. The rule applies measurably to street railroads. A person can not recklessly run into danger, and hold the railroad responsible if he is injured. He must use his faculties, and if he sees a car approaching, he will not be held faultless, if he is injured in attempting to cross in front of it, unless there be sufficient time to do so safely.

The plaintiff attempted to do this. He saw the approaching car, and crossed in front of it. He could have gone quite across the street. That was his prudent course, and there entered the up-car. But he stopped between the tracks, and there waited for the up-car to pass far enough to bring the rear platform opposite to where he was standing, and all the time the down-car was rapidly approaching, and about to pass within a few inches of his person.

Looking at all this evidence, I can not persuade myself that there was not, not only a small or slight degree of negligence on the plaintiff's part, but such a

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large and unmistakable want of proper care and prudence on his part, as should defeat a recovery.

The plaintiff is a man of intelligence, and at the time of the injury in the use of his limbs and faculties, and capable of understanding and appreciating the dangers of the situation.

There was time for prudent choice and correct apprehension of all the circumstances.

I am of opinion, therefore, that the evidence clearly established the contributive negligence of the plaintiff, and upon that issue the verdict of the jury ought to have been for the defendants.

The order appealed from should be reversed, but as it is reversed upon the facts, it must be on payment of the costs of the trial.

In that event a new trial is ordered.

Judgment and order reversed, as above.

SEDGWICK, J., concurred.

Statement of the Case.

MANNING F. LAWSON, PLAINTIFF AND RESPON-
DENT, v. STEPHEN R. PINCKNEY, DEFENDANT
AND APPELLANT.

I. NOTES, ETC. PAYABLE IN ANOTHER STATE, EVIDENCE
OF PROTEST, ETC., OF.

1. CERTIFICATE OF A NOTARY PUBLIC OF SUCH OTHER STATE
AS TO PROTEST, ETC.

(a) *Competency of.*

1. A certificate authorized and required by the laws of another state is *competent* evidence as to the matters in respect whereof it is so authorized and required.

(b) *Limitation of.*

1. Not limited by the laws of this state to cases where the *defendant fails to annex* to his answer an affidavit that no notice of protest or presentment was ever given to him.

(c) *Sufficiency of.*

1. If the statutes of another state *prescribe the form* of the notarial certificate, or that it shall contain certain matters, and then that a certificate in such form or containing such matters shall be proof of presentment, refusal to pay, and notice to endorsers *such a certificate will be proof* of such matters in this state.
2. *If there are no such statutes*, the notarial certificate must set forth the facts, showing the manner in which the note was presented and payment demanded, and notice thereof given, specifying the acts done by the notary; and if the facts thus specified show either a presentment or demand, or giving of notice in any mode other than as recognized by the common law, or the statutes of this state, then either the certificate must in some way show that the mode adopted was according to the laws of such other state, or the law of such state authorizing the mode adopted must be proved as a fact on the trial.
3. "*Of all which I duly notified the endorsers,*" a certificate containing these words is not sufficient under the common law or the statutes of this state.

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II. APPEAL.

1. INSUFFICIENCY IN EVIDENCE BELOW; AS TO SUPPLYING ON APPEAL.

(a) *Written and unwritten laws of another state.*

1. Must be proved in the court below.

2. *Neither the statutes, nor the reports of decisions of the courts, of such other state (when not proved on the trial) can be considered on appeal for the purpose of determining the law of such other state.*

Per SEDGWICK J., MONELL, Ch. J., concurring.

2. MODIFYING JUDGMENT ON.

(a) *Affirming as to part, and reversing and ordering a new trial as to part.*1. When the complaint contains *several causes of action*, and on the trial the plaintiff obtains a verdict as to all, and judgment is entered accordingly, the General Term on appeal may *affirm as to those causes* of action as to which no error was committed, and *reverse and order a new trial as to those* in respect to which error was committed, when a separation of the judgment may be made by mere calculation.

1. COSTS OF APPEAL. In such case no costs of appeal should be awarded to either party.

III. PROOF AND EVIDENCE, DISTINCTION BETWEEN.

Per SEDGWICK, J.

IV. APPLICATION OF ABOVE PRINCIPLES.

1. PENNSYLVANIA PROTEST.

(a) In an action in this state against the endorsers of a promissory note, payable in Pennsylvania, the plaintiff, to prove presentment, refusal to pay, and notice to the endorsers, read in evidence (under objection) a notarial certificate made by a notary public of the city of Philadelphia, certifying that he had made due presentment of the note, and that payment was refused, whereupon he did protest, etc., "of all which I duly notified the endorsers." He also read in evidence a *statute of the state of Pennsylvania, passed Dec. 14, 1854, printed in the laws of that state for 1855, at p. 724*; that statute did not prescribe the mode of serving notice, nor did it make a certificate of the form of the one in question, proof or evidence of the service of notice; there was no proof at the trial, either by the reading in evidence of the statutes, or the reports of cases decided, by the courts of that state, or otherwise, either that a certificate like the one in question was by the law of that state proof or evidence of the service of notice, or as to what mode was pre-

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scribed by the law of that state for the service of notice. The complaint contained five causes of action, three on promissory notes payable in Philadelphia, as to which the aforesaid notarial certificate was read in evidence, and two on checks drawn on a bank in the city of New York, as to which said certificate had no effect. Plaintiff had a general verdict on all the causes of action for four thousand eight hundred and fifty-seven dollars and seventy cents; but by computation it was easily ascertained how much of this was on the causes of action on the checks, and how much on the causes of action on the notes.

HELD,

upon a review of the acts of this state (ch. 809, *Laws of 1865*; ch. 141, *Laws 1885*; and ch. 271, *Laws, 1883*) and of the Pennsylvania act read in evidence, that the certificate was not evidence or proof of service of notice; and therefore its reception was error.

HELD FURTHER,

that by reason of this error the judgment so far as it proceeded, on the causes of action upon the notes should be reversed and a new trial ordered.

BUT,

as the error did not affect the recovery on the causes of action on the checks, the judgment, so far as it proceeded on them, should be affirmed.

HELD FURTHER,

that neither party should have costs of appeal.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from judgment and order.

The action was against the defendant as the endorser of three promissory notes, drawn and dated at Philadelphia and payable there, and as the maker of two checks drawn on a bank in the city of New York. The complaint contained five causes of action—three on the notes, and two on the checks.

The defendant by his answer averred that no notice of protest or presentment of the notes was ever given to him, and he annexed to his answer an affidavit specially alleging the same.

Statement of the Case.

The plaintiff, on the trial, produced and read in evidence, the certificate of a notary public of the city of Philadelphia, in which he certified that he had made due presentment of the notes, and that payment was refused. Whereupon he did protest, &c., "*of all which I duly notified the endorsers.*"

The plaintiff also offered and read in evidence the following section of the statute of the State of Pennsylvania :

"Section 2. That the official acts, protests and attestations of all notaries public, certified according to law under their respective hands and seals of office, respect to the dishonor of all bills and promissory notes, and of notice to the drawers, acceptors, and endorsers thereof, may be received and read in evidence as proof of the facts therein stated, in all suits now pending or hereafter to be brought. Provided, that any party may be permitted to contradict by other evidence any such certificate."

The defendant objected to the certificate as insufficient proof of the service of notice of protest, and at the close of the plaintiff's evidence, moved to dismiss the complaint on the grounds. *First.* That there was no evidence of due notice of protest. *Second.* That the certificates were inadmissible to show the service of notice of protest, an affidavit denying notice having been served with the answer. And *Third.* That the certificate did not show due or sufficient service of notice.

The objection to the certificate was overruled, and the motion to dismiss denied. The defendant excepted. At the time of the trial the principal and interest on the notes amounted to three thousand and fifty-one dollars and fifty cents, and on the checks to one thousand eight hundred and six dollars and twenty-two cents.

The plaintiff had a verdict for four thousand eight hundred and fifty-seven dollars and seventy-two cents.

The defendant appealed.

Appellant's Points.

Pinckney & Spink, attorneys, and of counsel for appellant, as to the points decided by the court, urged :—I. The court erred in admitting the certificates. The affidavit annexed to the answer, as provided by statute, of non-receipt of notice, in all cases makes common-law evidence of notice necessary (*Seneca Co. Bank v. Neass*, 3 *N. Y.* 445).

II. The presumption arising from any notarial certificate ceases when the defendant serves, with his answer, an affidavit that he has received no notice of presentment or protest. The statute of 1833 may not affect the certificate of the notary, as to his common-law powers and duties, but in all other respects it is submitted that it is in operation (*N. Y. Sess. Laws of 1833*, ch. 271, § 8, 395; *Seneca Co. Bank v. Neass*, 3 *N. Y.* 442).

III. The court erred in refusing the motion for nonsuit. The only evidence of notice to the endorser was the notarial certificates.

IV. If the notarial certificates were admissible for any purpose, they were incompetent as evidence of notice. It is no part of the common-law duty of a notary to serve notices of protest (*Brooke, Office of Notary*, 79 and 139; *Bank of Rochester v. Gray*, 2 *Hill*, 227; *Ross v. Bedell*, 5 *Duer*, 462).

V. The laws of Pennsylvania nowhere define or enlarge the duties of notaries public in respect to bills of exchange or promissory notes, but leave them as fixed and settled under the common law (*Purdon's Digest of Laws of Penn.*, title Notaries Public).

VI. The Act of Dec. 14, 1854 (*Penn. Laws of 1855*, 724), does not enlarge the duties of notaries at all, nor does it alter the effect of the certificates of notaries of that commonwealth. It repeats the rule as it had long existed, and extends it to notaries of other states (*Act of Assembly*, January 2, 1815, 6 *Sm.* 238; *Starr v. Sanford*, 9 *Wright*. 45 *Pa.*, 195).

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VII. If the law of this state (*Session Laws of 1865*, ch. 309, 516), taken with the Penn. Act of Dec. 14, 1854 (*Penn. Laws*, 1855, 724), shall be held to make a notarial certificate proof of service of notice; still these certificates are incompetent for that purpose. The Pennsylvania Act makes them evidence of the facts therein stated. The facts in respect to presentment, demand, and protest are stated, but no fact in respect to notice is given.

VIII. A fact is a circumstance, act, or event—and facts in the meaning of the law are physical facts, capable of being established by oral or documentary proof—not propositions which are true in law (*Lawrence v. Wright*, 2 *Duer*, 673; *Drake v. Cockroft*, 4 *E. D. Smith*, 34).

IX. The notarial certificate should contain such facts as would be competent testimony, if orally given (*Rogers v. Jackson*, 19 *Wend.* 383; *Taylor v. Stringer*, 1 *Hill*, 377; *Parsons on Notes and Bills*, vol. 2, 495; *Stewart v. Allison*, 6 *Sergeant & Rawle*, 324, dissenting opinion of GIBSON, J., 329).

X. The danger and injustice of any other rule is well illustrated by *Woods v. Neeld* (44 *Penn.* 86).

North, Ward & Wagstaff, attorneys, and *Thomas M. North*, of counsel for respondent, as to the points decided by the court, urged :—I. As to the protest and notice of protest. The notes were foreign notes, and the protest was a foreign protest. The notes were dated and payable in Philadelphia, and protested there. This court in *Ross v. Bedell* (5 *Duer*, 462) intimated that proof sufficient to maintain an action in the courts of the state where the note is payable, would maintain it here. The statute of 1858 (*Sess. Laws*, 516) declared such to be the law of this state. The law of Pennsylvania, applicable to this case, appears by its statute, duly proved and printed in the case, and by

Respondent's Points.

the reported decisions of its courts below noted. It is the law of that state, that the protest of promissory notes, and the giving notice thereof to the endorsers, are official duties of a notary, and that his certificate of the performance thereof, is *prima facie* evidence, not only that he performed them, but that the protest was made, and the notice given in all respects according to law (*Statute Case*, fol. 83; *Stewart v. Allison*, 6 *Serg. & R.* 324; *Browne v. Phil. Bank*, *Id.* 484; *Fitler v. Morris*, 6 *Whart.* 415; *Jenks v. Doyleston Bk.*, 4 *Watts & S.*, 505; *Kase v. Getchell*, 21 *Pa. St. Rep.* 503). It is also the law of Pennsylvania, that the notary's certificate, under seal, proves itself (*Browne v. Phila. Bank*, *ubi supra*; *Lloyd v. McGarr*, 3 *Barr*, 474). Such is also the law of this state, and of most others as to foreign protests. Chitty says (*Bills*, 361, 362), "There is no necessity to prove the signature of the notary, or his seal; to it all courts give credit." So held in *Ross v. Bedell*, *ubi supra*, and in cases there cited at p. 466. It is also the law of Pennsylvania, that it is sufficient if the notary certifies that he gave notice of protest to the endorsers, though he does not state how he gave it (see cases above cited; also *Lloyd v. McGarr*, 3 *Barr*, 474; *Woods v. Neals*, 44 *Penn. Rep.* 86).

II. The idea that the act of 1865 does not apply when an affidavit denying notice is filed by defendant, seems to have grown out of the act of 1833, ch. 271, § 8 (3 *R. S.*, 5th Ed., 474), which provides that "this section shall not apply to any case in which the defendant shall annex to his plea an affidavit, &c." The proviso only operates to preclude a certificate where the certificate derives its efficiency from that act. The act was expressly held not to apply to foreign protests by this court, in *Kirtland v. Wanzen* (2 *Duer*, 278); and by the supreme court, in *Bank of Rochester v. Gray* (2 *Hill*, 227). It was held in *McKnight v. Lewis*

Opinion of the Court, by MONELL, Ch. J.

(5 Barb. 681) not to limit the provision of the previous act (2 R. S., 283), and of course it can not limit a subsequent act.

III. It was not necessary that the certificate should state how or in what manner he notified the endorsers, nor where, nor anything further than "of all which I duly notified the endorsers." The courts of Pennsylvania, if this action had been on trial there, must necessarily, under their decisions above cited, have held these certificates to be "*prima facie* evidence that personal notice was given," and would have presumed that defendant was in Philadelphia to receive it, or would have presumed service by mail, or in some way "according to law." Proof authorized and required by the laws of Pennsylvania to maintain the action, having been made, unless it was rebutted, the notes by our statute, "shall be held and deemed to have been duly and sufficiently protested, and notice of all thereof duly given."

BY THE COURT.—MONELL, Ch. J.—The admissibility of the notarial certificate as evidence, depends upon the construction of the act of 1865 (*Laws of 1865*, ch. 309), concerning proof of the protest of notes, which are payable out of this state.

That act provides that presentment of such notes, and notice of protest may be made, "according to the laws of such other state, &c. And in any action in any of the courts of this state . . . such proof of such presentment . . . and notice thereof, may be made, as is authorized and required by such laws. And on such proof being made, the . . . note shall be deemed to have been duly and sufficiently presented and protested, *and notice of all thereof duly given.*"

The construction and application of this statute would be very plain, if there were no other statutes to be considered.

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By an act passed in 1833 (*Laws of 1833*, ch. 271, § 8), the certificate of a notary of *this state* is made presumptive evidence of the service of notice of protest, but the act has no application where the defendant annexes to his answer (plea) an affidavit, denying the fact of having received notice, as was done in this case. Under the act referred to, the certificate of the notary must specify the mode of giving the notice, and the reputed place of residence of the party to whom it was given, and the post office nearest thereto. This was slightly modified by the act of 1835, *Laws of 1835* 152, ch. 141.) As to the acts required to be done by the notary, the certificate is made presumptive evidence.

In respect to the specification of the facts or acts of the notary, the statute of Pennsylvania differs from ours. Their statute provides that the official acts, protests, and attestations of notaries public, certified according to law under their hands and seals, may be received and read in evidence as proof of the facts therein stated. There is nothing in that statute, which, like ours, prescribes the manner of serving notice; nor was any other statute, fixing the mode, proved on the trial; and it is understood there is no such statute.

That, however, does not affect the question of the application of the act of 1865, which, apparently, makes any certificate under the hand and seal of a notary, evidence of the facts certified.

There is no repealing clause of the previous statute, but there is enough in the act of 1865, I think, to work a repeal by implication of so much of such previous statute as limits the certificate as presumptive evidence, to cases where the defendant fails to annex an affidavit to his answer. The policy of a rule of proving notice of the protest of foreign bills and notes, different from that which is required in respect to domestic paper, is a matter for the legislature, and not for the courts.

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The act is certainly broad enough to admit as evidence a notarial certificate, notwithstanding the defendant has put himself on the record, so as to have made the certificate inadmissible if the note had been protested in this state.

The competency of this kind of evidence was decided in the supreme court of this department, in *Fassin v. Hubbard* (61 Barb. 548), but it does not appear in that case, that the defendant had annexed an affidavit to his answer, and no question, therefore, was presented of the effect of the acts of 1833 and 1835, upon the act of 1865.

But the latter act contains no exception. The certificate of a foreign notary is made evidence in all cases, and it is not, by anything contained in the act, limited to cases where the defendant has omitted to make the affidavit.

I am, therefore, of the opinion that the certificate was competent evidence, and the objection to its admission was properly overruled.

But the objection to its sufficiency remains.

The act of 1865 provides, that notes made payable in any state other than this state, may be presented for payment, and protested for refusal to pay, and *notice* of such presentment, and refusal may be made *according to the laws of such other state*. And in an action in the courts of this state upon such note, such proof of presentment, &c., may be made as is authorized and required by such laws.

The statute of Pennsylvania makes the official certificate of a notary public evidence, and meets or covers that part of the act of 1865, in respect to the proof "authorized and required by such laws," but does not provide, nor was any other statute or law given in evidence, which provides or shows that the presentment, refusal to pay, and notice thereof was made "*according to the laws*" of that state.

The certificate is made evidence "*of the facts therein stated*," and of nothing more. And as it does not show that the presentment and notice was made and given in accordance with the laws of the state of Pennsylvania, it can not be made available, as evidence of giving notice to the endorser.

To make the certificate evidence at all, under our act it is incumbent on the plaintiff to show that the presentment and notice of protest was made in accordance with the law of the State where the presentment is made and notice given.

In that respect there was a failure of proof. The certificate was deficient in not stating the facts, showing that the protest and notice was made in the manner provided by law, and the plaintiff offered no other evidence that it was so done.

In the case of *Fassin v. Hubbard* (*supra*), it was *proved* that notaries public in Louisiana were required, by statute, to keep a record of the protests made by them, together with mention of the notices given by them, and the manner in which they were served.

It can not be successfully contended, I think, that after reciting the presentment of the notes, and the refusal to pay, it is enough for the notary to certify, "of all which I duly notified the endorsers;" unless it is shown that by the law of Pennsylvania, the certificate is not required to state anything more or further. If there is any manner of giving such notices prescribed by statute in Pennsylvania, as there is in this State, then such mode must be followed, and it must be specially stated in the certificate. To certify that it was duly done is not sufficient.

Independently of any statute, the law provides the various modes of giving notice according to the exigencies of every case. Thus it may be either personal, or at the domicile or place of business of the party; or

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by the post, or by a special messenger, &c. But if by the post, it seems indispensable that it should be in writing, and be sent to the appropriate post-office.

In meeting the denial of notice by the endorser, enough must be shown to answer the law. It must appear that notice was given in one or other of the prescribed modes; and if by the post, that it was addressed to the proper post-office. It is no part of the duty of a notary public to notify the parties entitled to notice, of the non-payment of a bill or note unless required to do so by statute (*Bank of Rochester v. Gray*, 2 *Hill*, 227). And when his certificate, for convenience or economy, or otherwise, is allowed to be substituted in some cases for oral proof of the protest and notice, it must contain as much, at least, as would be required in his oral testimony. It was not intended, I think, that it might contain less facts than would be required in the oral proof; and the statement of the notary on the stand, that he had "duly notified the endorsers," would not be regarded as sufficiently describing the manner of notifying. He would be asked, and required to answer, how, and in what form and particular manner he had given or served the notice.

The presumption which arises in favor of the performance of official duty is confined to the act itself. Thus where an officer is required to do a certain thing, it will be presumed that he has done it, and his certifying he has done it, will be taken as true. But when the officer certifies to the doing of the act, he must certify to having done all that the law requires him to do; and there is no presumption that will supply any omission in that particular.

Where proof by certificate is substituted for common-law evidence, all the forms directed by the statute, whether preliminary or substantial, must be strictly complied with (*Rogers v. Jackson*, 19 *Wend.* 383).

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And the rule applies as well to duties required by or performed under the common law. In the case cited, the certificate omitted to specify the post-office nearest to the reputed place of residence of the party notified, and the certificate was held to be insufficient.

The language of the act of 1865, is to me very plain. It does not absolutely render a foreign notarial certificate sufficient, unless the notary certifies to enough. If there is a statute prescribing the manner of notifying endorsers, the certificate must state the mode of service. If there is no statute, then the common-law mode must be followed, and the certificate must state the facts.

The act allows presentment and notice to be made and given, according to the laws of such other state, and proof thereof to be made as is authorized and required by such laws. On such proof, *i. e.*, that the presentment and notice was according to the laws of such state, being made, it shall be held to have been duly done, and such a certificate would be enough.

So far the *lex loci* will control. If the protest and notice is in accordance with the laws of the state where the note is payable, it will conclude the courts here. But the proof and its sufficiency is governed by the *lex fori*, unless it is shown that the proof is of all the facts required by the laws of such foreign state, or by the common law. And the burden of showing that rests upon the holder of the dishonored paper.

If these views are correct, then the notarial certificate should have been excluded from the jury, as not containing or being any evidence whatever of the service of notice upon the defendant; and the learned justice erred in refusing so to charge.

Therefore, the submission of the question of notice to the jury as a fact to be found upon somewhat conflicting evidence, does not cure or remove the objection to their finding it upon improper evidence. •

Concurring opinion of SEDGWICK, J.

As no objection to a recovery upon the checks was raised before us on the appeal, and as it was in substance conceded by the appellant's counsel that the only error was in the admission of the notarial certificates, which relate solely to the notes in suit, there is no reason for disturbing so much of the judgment as is covered by the checks.

The judgment will be modified by deducting therefrom the sum of three thousand and fifty-one dollars and fifty cents, being the amount of the notes and interest, and as modified, affirmed, without costs of the appeal.

And as to the notes mentioned and described in the complaint, the judgment must be reversed, and a new trial granted, upon the pleadings applicable thereto, without costs of the appeal to either party.

SEDGWICK, J. (concurring).—Our statute of 1865 called for proof upon the trial of what was notice of presentment and non-payment, according to the laws of Pennsylvania, and what proof of such notice was authorized and required by such laws. This was a matter of fact to be governed by the common-law rules of evidence, and our statutes. The evidence must be given upon the trial (§ 486 of 1 *Gr. Ev.* and note of editor referring to a new section, § 688a. added by him to his edition of *Story's Conf. of Laws*). § 426 of the Code of Procedure enacts that printed copies of statutes of any state, &c., purporting to be published by authority, shall be admitted *on all occasions* as presumptive evidence of the laws of such state, and the unwritten or common law of any other states &c., may be proved as facts by parol evidence, and the book of reports of cases adjudged in these courts, may also be admitted as presumptive evidence of such laws.

In *Cutter v. Wright* (22 *N. Y.* 472), one of the judges considered that on the question of usury raised

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at the trial in regard to a contract governed by the laws of Florida, the Code cited above made it legal to examine the statutes of Florida for the first time in the court of appeals. But in *Hunt v. Johnson* (44 N. Y. 27), one of the judges said, and it seems to me more fairly, that the statute must be proved on the trial, or otherwise not considered on appeal. It was but evidence of a fact, and only presumptive evidence, as to which the opposing party had a right to give further evidence. Such a proceeding could take place only on the trial, and was itself subject to review upon appeal.

In the present case the Pennsylvania statute, on which the plaintiff relies, was duly proven at the trial, and under this the notary's certificate was admitted.

There was no proof, however, of what notice of presentation and non-payment of a promissory note, the laws of Pennsylvania required to make an endorser liable. On this point, for the reasons stated in respect of statutes, the books of reports of cases adjudged in the court of Pennsylvania, were not evidence when cited in the case for the first time on this appeal, nor were they evidence to show that the language of the certificate, "of all which I duly notified the endorsers," were by the laws of that state, *prima facie* evidence of the existence of the fact of sufficient notice. By the common law, to which we are left in construing the certificate, the phrase quoted does not state facts, but a declaration that some unstated facts were sufficient in the notary's opinion to constitute the notice to be by law given to the endorser to make him liable." It is therefore not proper to examine if the present certificate has the effect claimed by plaintiff, under the reported cases cited from the Pennsylvania Reports.

We are not, then, called upon to give a more particular construction of the statute of 1865, of this state. There is a question as to the meaning of the provision,

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"proof, &c., of such notice thereof, may be made as is authorized and required by such law."

"The word evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. This term, and the word *proof*, are often used indifferently, as synonymous with each other, but the latter is applied by the most accurate logicians to the *effect* of evidence, and not to the medium by which truth is established (1 *Gr. Ev.* § 1). If the word "proof," in the statute designates the means of establishing the facts, the effect of the evidence would be left entirely to our courts, to be applied to the law of Pennsylvania, as to what notice was necessary to be given to an endorser. This construction would agree with the general, useful, and easily-applied rule, that the weight and sufficiency of testimony is controlled by the *lex fori*."

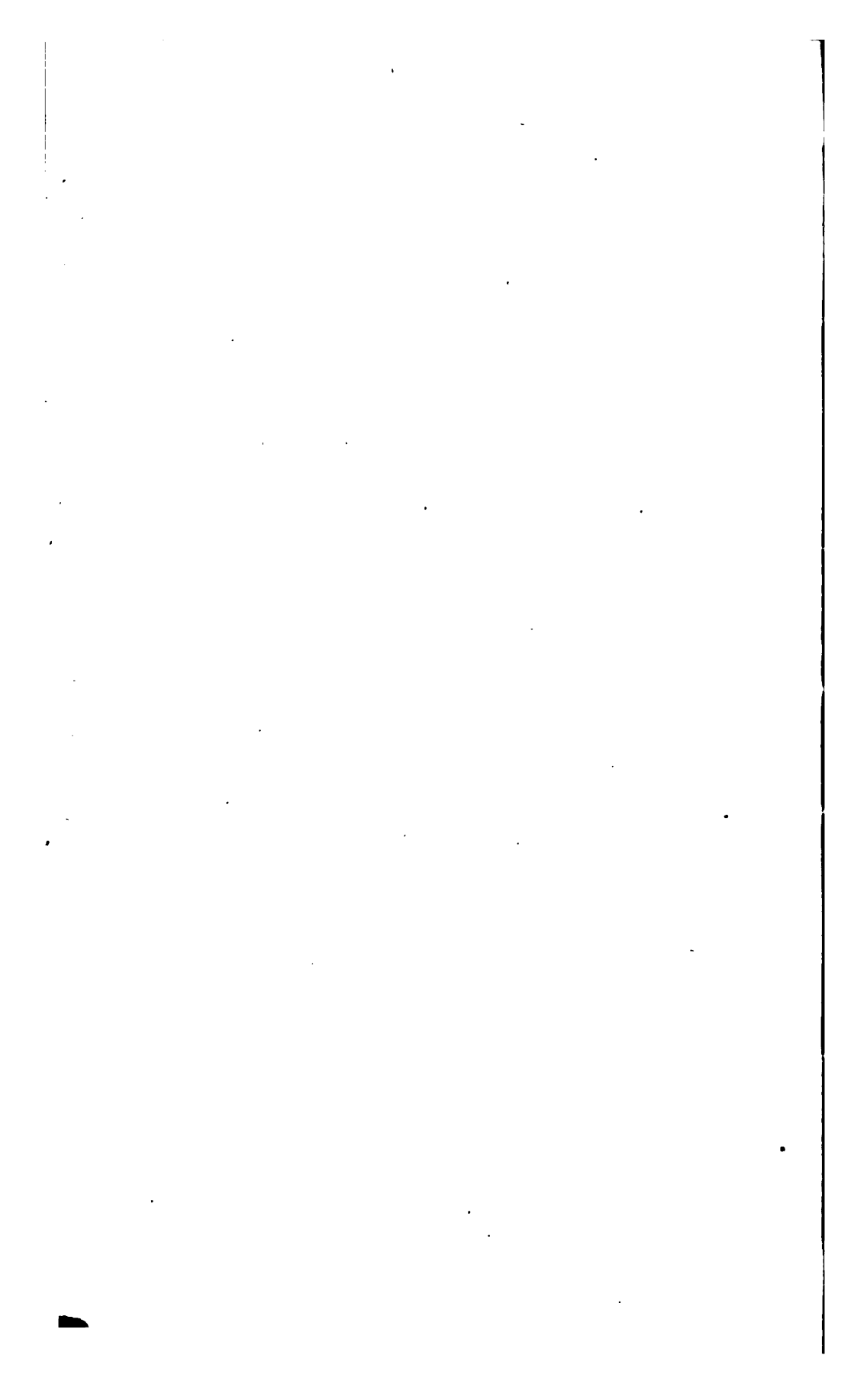
On the other hand, if the word implies the means of proof, and its sufficiency to establish the existence of the fact under investigation, the broader rule would be recognized as the object of the statute, that the obligations of parties to a contract made and to be performed in another state, are governed by the laws of such state. And if it appeared, in a case like the present, that the obligations of the defendant were such as were created by the laws of Pennsylvania and that there an endorser would be liable, *prima facie*, so far as notice was concerned by the production of a notary's certificate like the one here, the statute of our state would provide for such a case. I am inclined to the latter construction, because the statute ends with the words, "And on such proof being made, the said bill of exchange or promissory note or bank check, shall be held to be, and deemed to have been duly presented, &c., and notice of all thereof duly given." This can not mean that if the same kind of evidence is used here

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that is authorized in another state, notice shall be deemed to be given, irrespective of the contents of the evidence.

But for the reasons stated in the learned Chief Justice's opinion, as well as here, I concur in the conclusion arrived at by him.

MONELL, Ch. J., concurred in this opinion.



Statement of the Case.

WILLIAM R. CARNES, PLAINTIFF AND RESPOND-
ENT, v. GEORGE W. PLATT, IMPEADED, ETC.,
DEFENDANT AND APPELLANT.

I. EJECTMENT.

1. COSTS OF FORMER TRIAL, NOT TAXABLE.

(a.) *Upon a new trial, under § 37, title 1, chap. 5, part 3, R. S., providing that the court in which judgment shall be rendered in an action of ejectment, shall within three years thereafter, upon the application of the party against whom the same was rendered, and upon payment of all costs and damages recovered thereby, vacate such judgment and grant a new trial, the party in whose favor such new trial is granted, can not, upon recovery of a judgment thereon, tax as part of his costs the costs for proceedings had before the granting of the order for a new trial.*

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1876.

Appeal from order affirming taxation of costs.

This action was brought to eject the defendant from certain property in the city of New York.

The following proceedings have been had in the action:

First.—A trial before Mr. Justice BARBOUR. Verdict for defendant.

Appeal to the general term. Judgment reversed, with costs to abide the event.

Second.—A trial before Mr. Chief Justice ROBERTSON. Verdict for plaintiff.

Appeal to the general term. Judgment affirmed.

Appeal to the court of appeals. Judgment reversed, with costs to abide the event.

Statement of the Case.

Third.—A trial before Mr. Justice SEDGWICK.
Verdict for plaintiff.

Appeal to the general term Judgment affirmed.

Appeal to the court of appeals. Judgment affirmed.

Fourth.—An order under 2 R. S. 309, § 37, granting a new trial herein, and vacating the judgments previously entered, the defendant Platt having paid all the costs recovered by the plaintiff herein.

Fifth.—A trial before Mr. Justice FREEDMAN.
Verdict for defendant.

The defendant, after the last trial, presented his bill of costs to the clerk of this court for adjustment, including in the bill all of defendant's costs and all of his disbursements incurred in all of the proceedings herein.

The clerk refused to allow the defendant any costs, except those for proceedings after the order granting a new trial, and no disbursements except those incidental to the new trial.

The costs taxed by the clerk were as follows :

"Costs on Fourth Trial.

Costs after New Trial granted and before New Trial	\$25 00
Term Fees, Five Terms.....	50 00
Trial Fee.....	30 00
Allowance by order.....	500 00
	<hr/>
	\$1,340 00

"Disbursements.

Witness Fees, Fourth Trial.....	\$5 50
Clerk entering Judgment, Fourth Trial	1 00
Transcript and Filing, Fourth Trial	11
Sheriff returning Execution, Fourth Trial.....	69
Stenographer's Minutes, Fourth Trial.....	10 80 "

Appellant's points.

From this taxation defendant appealed to the special term, when it was affirmed, and he now appeals to the general term.

Edward S. Clinch, attorney and of counsel for appellant, urged: I. The defendant having finally succeeded, is entitled to recover his entire costs in the suit from its commencement down to, and including the entry of judgment on the verdict rendered at the fourth and last trial (*Carvey v. Rider*, 2 *Cow.* 617; *Meule v. Goddard*, 5 *B. & Ald.* 766; *David v. Haring*, 1 *St.* 300; *Burchall v. Bellamy*, 5 *Burr.* 2693).

II. The terms "that the costs shall abide the event of the suit, has been construed to mean that the party who *finally* succeeds, is entitled to his costs upon all the previous trials, whether he failed or succeeded in them, if those costs were directed to abide the event of the suit (*Carves v. Rider*, *supra*; *Meule v. Goddard*, *Id.*; 4 *Chitty's Gen. Practice*, 89; 1 *Paine and Duer's Practice*, 585).

III. An "event"—from the Latin "*evenire*," to come out or from—is a thing which happens from or follows, a cause, and they are called "events," because they come out of a cause (*Burrill's Law Dict.*, "*Eventus*"). The event, in an action of ejectment, is the recovery by the plaintiff, or the maintenance by the defendant, of possession of the property which is the subject of the action. In this action the event has been the final success of the defendant in maintaining possession.

IV. The reason urged on the argument at the special term why the defendant should not recover the costs of proceedings before the order of January 28, 1875, granting a new trial herein, that such order was made on the payment by defendant of plaintiff's costs, as a condition precedent to such new trial, is not sound,

Appellant's points.

because the defendant does not ask to be paid the plaintiff's costs, but asks that his costs which are distinct from plaintiff's, be allowed him. The payment of costs prior to a second trial in ejectment bears no analogy to the payment of costs as a condition of granting a motion, for the costs in the latter case are imposed as a penalty, as it were, for some erroneous proceeding, or as a condition of receiving a favor, while in the former it is imposed to invoke from the unsuccessful party, some evidence of good faith in the continuance of the litigation, and on the payment of them the new trial is a matter of right. At common law, the action of ejectment was a mere possessory action, and concluded no one, either as to the title or possession, except as to the time between the day of the demise and the recovery. Even the party against whom the judgment was rendered was at liberty to bring a new action, and again litigate as to the possession as often as he pleased (*Tyler on Ejectment*, 632 ; *Ainslie v. The Mayor*, 1 *Barb.* 168). To prevent this constant litigation, and to provide for the settlement of titles to real estate, after a reasonable number of opportunities to the interested parties to prove title, the rule of the common law was changed by the revised Statutes, and evidence of good faith was required of the unsuccessful party before being allowed again to litigate his title. There is no provision of the statute from which any inference can be drawn that the costs for proceedings before a new trial can not be collected, and in the absence of such provision the court should not make a rule which, while the last trial may result in a judgment in favor of the party paying the costs, prevents the recovery by the party of the compensation for his trouble provided by the Code in the way of costs, and even the disbursements necessarily made by him in the preparation of his cause for trial. The court should rather see that com-

Respondent's Points.

plete restitution was made to the finally successful party.

William G. Sterling, attorney, and *Daniel T. Walden*, of counsel for respondent, urged:—I. The defendant paid the costs of the previous proceedings as a condition to obtaining the new trial, and, as those have all been awarded and paid to plaintiff, the defendant can not now recover them (*Slocum v. Lansing*, 3 *Denio*, 259 ; *Linacre v. Lush*, 3 *Wend.* 305).

II. The effect of the order granting the new trial under the statute, is to strike out all the proceedings in the action to and including the judgment, leaving the issue to be tried again. So that whoever succeeds on the trial recovers costs only for the proceedings from the time the new trial is ordered. Were this not so, the case might result in the absurdity of giving to the plaintiff a second time the costs of services for which he had once been paid. If the plaintiff had had a verdict on the new trial, would the defendant concede that he should recover all the costs again from the beginning ; if not, why should defendant on his success ?

III. Formerly a judgment in ejectment did not determine the right of property, and either party when unsuccessful might bring in a new ejectment to recover the possession, and ejectments might thus be indefinitely repeated, until a Court of Equity afforded relief by restraining further litigation. The Revised Statutes in making the judgment conclusive as to title saved the necessity of applying to a court of equity, and provided a mode by which the unsuccessful party, if dissatisfied, may still be indulged with a further trial (2 *Paine and Duer*, *Pr.* 517 ; 3 *R. S.* (2d. Ed.) 709, Revisor's notes ; *Bates v. Stearns*, 23 *Wend.* 483, *COWEN, J.*, 2 *R. S.* [2d. Ed.] § 42 ; 3 *R. S.* [5th Ed.] § 35). This history of the provisions as to new

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trial shows that the recovery of costs must be confined to the proceedings subsequent to the order granting the new trial.

BY THE COURT.—SEDGWICK, J.—The counsel for the defendant, places the defendant's right to costs upon directions made upon certain appeals, that costs were to abide the event; and he urges that the event referred to was the determination of the action finally, even after the defendant had voluntarily paid the costs under the statute. I do not see that such construction should be given to those directions. The event referred to was the first final judgment to be given, which when made, so far as the proceedings up to that event are concerned, was conclusive of the parties rights. So that, in fact, when the clerk taxed costs, if the question was open as to who should have costs, before the order giving the new trial, the first final judgment of the court of appeals was to be considered, and had determined that the plaintiff was entitled to the costs of the proceedings up to that time.

Beyond this, however, I am of opinion that the section of the Revised Statutes under which the new trial was granted, provide that the payment of costs by the unsuccessful party shall be a final disposition of the question of costs for former proceedings. The new trials contemplated by the Statute take the place of the new actions of ejectment that before the Statute might have been brought. Although new actions might be brought, they could not result in the unsuccessful party in the first action recovering his costs of that action. The first action was a final adjudication for all purposes, so far as the questions in issue were concerned. . From the proper construction of the Statute, and on general principles, when costs are given to one party, the opposite party has no right to costs for the same proceedings. If the position of the

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appellant is correct, the Statute provides that in certain contingencies in actions for ejectment both sides may have costs for a part of the proceedings.

The order appealed from should be affirmed, with ten dollars costs, and disbursements to be taxed.

MONELL, Ch. J., concurred.

ELIZABETH S. BREVOORT, PLAINTIFF AND APPELLANT, v. HENRY L. BREVOORT, DEFENDANT AND RESPONDENT.

I. PLEADING.

1. ANSWER.

(a.) *Ownership, when not necessary to be pleaded affirmatively.*

1. In an action of trover, defendant need not plead as an affirmative defense that he owned the property at the commencement of the action, nor show the source of, or mode by which he acquired, his title. A general denial of plaintiff's ownership suffices.

(b.) *Gift, title by.*

1. Where the strongest phrase in the pleading is "that the plaintiff relinquished all ownership" in the property, without any averment that defendant thereupon took possession as owner, *no defense is set up.*

(a) *So held* in an action by wife against the husband, the property in question being gifts made by him to her, when the answer alleged that the plaintiff violently threw the property from her, declaring that she returned it to defendant; that she would not keep it; and that she relinquished all ownership in it; and that defend-

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fant then took back the property as she desired, and kept possession of it.

2. DEMURRER TO ANSWER.

(a). *Judgment on overruling a demurrer to an answer which does not go in bar of the whole cause of action, what improper.*

1. An order directing that defendant have judgment in the action in his favor, and a judgment entered therein adjudging that the complaint be dismissed, are erroneous.

1. APPEAL. Such erroneous order and judgment will be reversed on appeal.

1. *Seemle.* There should only be an interlocutory order and judgment, simply overruling the demurrer, and perhaps adjudging the answer so far as it extends to be a good defense.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from order overruling demurrer to a separate defense, and from judgment thereon in favor of defendant.

The complaint was for the conversion by the defendant of certain personal property, part of which were several diamond rings.

The answer set up as to these rings a separate defense, and averred : "That the said plaintiff, while in a room in his father's house, took from her finger the engagement-ring, which this defendant had given her, and from her ears a pair of diamond ear-rings, the gift of this defendant, and from her pocket-book a small amount of money, given her by this defendant, and threw all said articles violently on the bed, saying she would not keep anything which was received from the defendant or his family, but returned them all to him. This defendant tried to induce said plaintiff to resume the possession of said rings, but she, in an insulting man-

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ner, repeated her remarks that she would not keep anything received from him, his family, or intimate friends; that she would not keep them, and relinquished all ownership therein. This defendant then took, as she desired, his gifts to her, back again, and kept possession of them. That said engagement-ring and said ear-rings are the articles claimed by plaintiff, and by defendant admitted to be in his possession."

The plaintiff demurred to this defense on the ground that it did not state facts sufficient to constitute a defense.

The order entered was, that the demurrer be overruled and that the defendant have judgment in said action in his favor. Judgment was entered, that the defendant have judgment, that the plaintiff's complaint be dismissed. The appeal is from the order and from the judgment.

Thomas M. Wheeler, attorney, and of counsel for appellant, urged :—I. If Mr. Justice SPEIR is right in his opinion that the facts stated in the second defense constitute a defense, then the order should have been one overruling the demurrer. The order made gives the defendant judgment in the action. This is erroneous. By the Code, sec. 168, the facts set forth in the answer are deemed to be denied, and these issues of fact, as well as the issues formed by the denial of the allegations of the complaint, must be tried.

II. The order being erroneous, the judgment founded on this order is erroneous.

III. The second defense relates only to the diamond ring and ear-rings mentioned in the complaint and that leaves all the issues formed by the first defense, in regard to the other articles mentioned in the complaint to be tried. The second defense is that the plaintiff gave to the defendant the diamond ring and ear-rings. The only question is whether the allegations contained

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therein constitute such a gift. The allegations are that the plaintiff, while in a state which induced the belief that she was out of her mind, and while in a violent passion, threw the things upon the bed, and said she would have nothing more to do with them, and returned them to the defendant. This certainly is not enough to constitute a voluntary gift, and as it does not, the demurrer should be sustained.

Van Winkle, Candler & Jay, attorneys, and *John E. Parsons*, of counsel for respondent, urged:—I. The defense demurred to alleges that the plaintiff made an absolute return to the defendant of the articles admitted to be in his possession, characterized by the most positive expression of her intention to have nothing more to do with them. This not only puts in issue the ownership of the particular articles, but claims the property in them to be in the defendant, and to have been received by him by transfer from the plaintiff, and the only question is whether a wife can make a gift to her husband of articles of personal property.

II. Absolute judgment was, by the defendant, entered upon the order overruling the demurrer. This was not authorized by the order, but the remedy to obtain relief was by motion, not by appeal. The defendant was entitled to have the demurrer overruled, and to judgment for costs. This the order directed, and it can not be disturbed. The judgment roll shows added a *postea* assuming to give absolute judgment for the defendant. The *postea* is signed by no one, and of itself has no legal effect. If it were not suitable to enter the judgment in that form, the matter should have been suggested to the defendant's attorneys, and if they insisted upon their practice, application should have been made to the special term; though *Wightman v. Shankland* (18 How. Pr. 79), assumes that final judgment is proper.

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BY THE COURT.—SEDGWICK, J.—The allegations of the second defense have no special value in taking issue upon the complaint. Under general denials the defendant could have put in evidence all facts relative to the ownership or conversion of the property. The plaintiff, however, demurred, and the question mooted was, whether the answer sufficiently averred that the defendant was owner of the rings, at the beginning of the action, by gift from the plaintiff.

To take issue upon the plaintiff's ownership, it was immaterial to allege the former relations of the parties, or the manner in which the plaintiff obtained the rings, if she were the owner, or the manner in which the defendant obtained them if he were the owner, or who was the owner if she was not, or the talk of the parties on any material or immaterial matters, or the manner of either party at any stage of the quarrel. The defense intermingles these matters, using words in a colloquial sense in such manner that the allegations are equivocal, and the rule should be applied that that construction should be adopted which is most unfavorable to the pleader.

There are, I think, two fatal defects. The first is, that all the special averments may be true, and yet when the action was begun the allegation of the complaint that the plaintiff was owner may have been true. There is nothing equivalent to an allegation that the defendant remained the owner from the time of the plaintiff's gift to him down to the bringing of the action. Second. It does not appear by the answer that the rings were delivered by the plaintiff to the defendant as a gift, or that he took them as such. Delivery and acceptance are as necessary to a parol gift as to a deed of gift. The gift "must be the mutual consent and concurrent will of both parties" (2 *Kent's Comm. marg.* p. 438). There are matters of evidence in the answer as to a gift, but they require the construo-

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tion of a jury before their effect can be ascertained. There is no averment that the plaintiff intended to give or to transfer the title, or that the defendant accepted the gifts. Both are necessary to show that the title was devolved from the plaintiff upon the defendant. There are words of legal and certain meaning which would imply all this, but the answer does not use them. The strongest phrase is, that the plaintiff "relinquished all ownership." Give to this the most meaning that may be, there is no averment connected therewith that the defendant thereupon took possession as owner. The answer says, "This defendant then took, as she desired, his gifts to her, back again, and kept possession of them." This is descriptive of certain things that he did, which may have all been done, and yet he have had no purpose of becoming the owner.

On the merits I think the demurrer should have been sustained.

The order entered directed "that the defendant have judgment in said action in his favor," and the judgment adjudged "that the plaintiff's complaint be dismissed."

When the defendant's plea goes to bar the action, if the plaintiff demur to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact, because upon the whole it appears that the plaintiff has no cause of action (2 *Tidd's Pr. marg.* p. 741; *Cooke v. Sayer*, 2 *Burr.* 754). In this case the issue made by the demurrer related to a part only of the property in dispute. As to the other part, the matters settled by the demurrer determined nothing. At the most, there should have been interlocutory judgment to stand upon the record until all the issues had been tried, when final judgment on the whole case should be entered.

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If such an interlocutory judgment had been entered in favor of defendant, it seems to me it would have been conclusive at all subsequent stages of the action as to the existence of the facts set out in the pleading demurred to (*Cutler v. Wright*, 22 *N. Y.* 478, opinion of Judge DAVIES), or at least of such facts as were not involved in the issues of fact (*Id.* 482, opinion of Judge SELDEN). "If there are other issues involving the same facts, they are not affected by the demurrer." (1 *Chitty on Plead.* 662). In the present case, the issues of fact made outside of the one raised by the separate defense that has been considered, do not involve any matter examined upon the demurrer, excepting, perhaps, an allegation in the first defense that the defendant denied that he had converted any of the articles claimed by the plaintiff. But as to the ear-rings, this would be immaterial, it being otherwise determined that the defendant owned them. Therefore, to enable the plaintiff to show that in fact she owned the ear-rings, the demurrer and the judgment against her upon it should be removed from the record by her procuring leave to withdraw the demurrer.

I am of opinion that the order and judgment appealed from should be reversed with costs to appellant, to abide the event of the action.

MONELL, Ch. J., concurred.

Statement of the Case.

GEORGE H. MERCER, PLAINTIFF AND RESPOND-
ENT, v. FRANCOIS VOSE, DEFENDANT AND AP-
PELLANT.

I. EVIDENCE.

1. WITNESS AS TO VALUE, EXAMINATION OF.

(a) *Must preliminarily be shown* (if so required in proper time by the party against whom the witness is called) to be acquainted with the value of like property, services, &c., with that as to which they are to testify.

(b) *Striking out testimony.* If such preliminary proof has not been so required, the testimony of the witness as to value can not be stricken out on the ground that it has not been given.

1. In such case the *burden rests on* the party against whom the witness is called to show his disqualification.

(c) In answer to a question, "Do you know the value of the services of an agent *whose duties are confidential* and embrace such duties as you know that plaintiff performed during the period you have testified to?" the witness said, "I can state what I know as to persons doing the same; leave the *confidential out*, and I should say yes." He then, under objection, testified to the value.

Held, no error.

a. His answer is as to the value of services irrespective of their confidential character.

b. The fact that they were confidential did not lessen their value.

(d) Witness preliminarily stating that he did not profess to be an expert.

1. This does not disqualify him as a witness to value if sufficient facts appeared to show that he was competent.

II. PRACTICE.

1. CONDUCT OF TRIAL.

Referee reserving his decision on objections to evidence, and receiving the evidence subject to the reservation, when not cause for reversal.

1. It is not, when the evidence thus received is either relevant or not calculated to injure the objecting party.

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Before MONELL, Ch. J., and SEDGWICK J.

Decided December 6, 1875.

Appeal from judgment entered on report of referee.

Theron G. Strong for appellant.

Osborn E. Bright for respondent.

BY THE COURT.—SEDGWICK, J.—An examination of the testimony convinces me that there was sufficient to support the referees finding that the plaintiff performed services for the defendant, under a special agreement, from August, 1871 to November, 1871, and performed further services from November, 1871, to March, 1873, under the implied promise that he was to be paid what the services were reasonably worth. Indeed, the answer of the defendant negatives the position that all the plaintiff's services were done under the special agreement of August 17, 1871.

I also am of opinion that there was no error in the allowance of testimony as to the value of services which calls for a reversal of the judgment. Undoubtedly in this state, witnesses may be called to give opinions as to the value of labor and services. (See cases in Digest, under opinions of witnesses in title Evidence.) They must be shown preliminarily, if objection be taken in time, to be acquainted with prices paid in other cases for services of a like kind. In the present case an apparent difficulty would be, that the services were of a peculiar kind, and probably not of the same kind with others as to which witnesses might have knowledge. This was, however, a matter of fact, and if witnesses swore to sufficient to permit their opinions as to value, the defendant's rights were to be preserved by cross-examination to weaken the

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force of the direct examination. I think, that in general, the witnesses swore to enough to entitle the plaintiff to claim that the referee should deem the witnesses qualified to testify as to value.

There is a special reason why the objection to plaintiff's competency as a witness as to value should be disregarded. He was allowed in the first instance to testify without objection, and the exception is to the referee not granting a motion to strike out his evidence. If the objection had been taken in time, it might have been obviated; and not having been taken in due time, the burden was upon the defendant, at least, to make it appear affirmatively that the witness was disqualified (41 *N. Y. R.* 349). I do not think enough was shown to make it the duty of the referee to strike out the evidence.

Again, in the case of another witness on the same point, Mr. Studwell, it is particularly objected that he testified to the enquiry if he knew the value of the services of an agent whose duties were confidential, &c., that "I can state what I know as to persons doing the same; leave the confidential out and I should say, yes, I should know"—yet was permitted afterwards, upon objection, to answer as to the value of services which in the question were stated to have been confidential. I think it appears that the answer last given was made upon the former qualification of the witnesses statement that he knew the value of the services which were to be valued, irrespective of their being confidential, and the fact that they were confidential did not lessen the value.

Another special objection was founded upon one of the witnesses as to value saying preliminarily that he did not profess to be an expert; and it is urged that it is conclusive. I do not think it is, for the reason that that was a matter of opinion of law and fact to be first decided by the referee; and if the facts appeared

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to show that he was competent, the referee should, as he did, disregard the witness's opinion.

I think we are justified in looking closely into the merits of the objections to the testimony as to value, inasmuch as from the referee's finding, it is evident that he made a most judicious use of this class of the evidence, and did not yield to the high estimates of value made by the witnesses.

The referee, in several instances, reserved a decision upon objections made by defendant's counsel. It is claimed that this is error. The defendant can not be injured by considering that the referee made a ruling which entitled him to an exception, as if to the admission of illegal testimony. In each case the testimony was either relevant or not calculated to injure the defendant.

There were other less important exceptions argued, and as to them, it is unnecessary to say more than that, after examining them, they were not well taken.

Judgment affirmed with costs.

MONELL, Ch. J., concurred.

Statement of the Case.

AUGUSTA WILLNER, PLAINTIFF AND APPELLANT,
v. JOHN H. MORRELL, DEFENDANT AND RE-
SPONDENT.

I. CONSTRUCTION OF INSTRUMENT.

1. REDEMPTION CLAUSE, EFFECT OF.

- (a) When contained in an instrument *in form of a bill of sale* of personal property, it only gives a right of redemption ; it does not reserve the right of possession to the party making the instrument, but the *party to whom it is made is entitled to possession against the maker.*

II. CONTRACT.

1. SPECIAL CLAUSES IN THE HEADING TO A RECEIPT.

- (a) When the receipt is not given until some time after the transactions evidenced by it have occurred, and it nowhere appears that the receiptee, or the party claiming under him at the time of the giving of the receipt, assented to the special clauses, *such special clauses will not constitute a contract although they in form purport to be such.*

III. WAREHOUSEMEN RECEIPTS.

SPECIAL CLAUSES.

- (a) The heading to a receipt contained the following clauses among others : "No goods delivered without a written order, or presentation of original receipt." "Goods will not be delivered to any person unless identified and authorized to receive the same."

Held,

that upon the demand by a vendee of the party who stored the goods, the original receipt being present, and he being accompanied by the person who in the matter of the storage acted for the party who stored the goods, and who was there to identify the person making the demand as being the vendee, the above clauses did not warrant a refusal to deliver.

1. *It was unnecessary to produce a written order.*

IV. PERSONAL PROPERTY.

1. CONTRACT NOT RUNNING WITH IT.

- (a) Where an owner makes a contract with his bailee whereby

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the bailor is not bound to deliver the property except on the written order of such owner, *the bailee can not justify a refusal* to deliver to a person succeeding to the ownership on the ground of non-presentation of a written order of such former owner.

Before MONELL, Ch. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from judgment.

The action was to recover the possession of certain house furniture. The complaint set out the instrument under which the plaintiff claimed possession. The instrument was, in its form, a bill of sale of the property, ending: "This sale is made on this express condition, that I shall have the right to redeem the above described property at any time within one year," upon payment of a specified sum of money, and it was executed by the then owner of the property.

The answer averred that under the bill of sale, above described, the plaintiff did not become immediately entitled to the possession of the property, and further, that before the bill of sale was executed, the then owner had stored the furniture with the defendant, who was a public store-house man, and that by the terms of the contract of storage he was not bound to deliver the property until the storage receipt given by defendant was returned to him; and the answer further denied that the property was wrongfully detained by the defendant.

The action was tried by the court, a jury being waived. It appeared by plaintiff's case that the then owner directed a person to have the property stored with the defendant, and it was so stored; but at the time, no storage receipt was given, or special contract of storage made. The owner afterwards, in considera-

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tion of a past indebtedness, made and delivered to the plaintiff the bill of sale above set out. A few weeks after this, the plaintiff, in company with the person who had acted for the owner in storing the property, went to the defendant at his store-house, showed the bill of sale to him, and demanded a delivery of the property to her. The defendant then delivered to the person accompanying the plaintiff a paper called the storage receipt. It was headed by several special clauses. Among them were, "No goods delivered without a written order or presentation of original receipt." "Goods will not be delivered to any person unless fully identified and authorized to receive them." There followed a simple receipt of the goods, as from the owner, signed by the defendant.

This paper was then handed to the plaintiff. The defendant in answer to plaintiff's demand, said he could not give up the furniture without an order from Miss Woodward, who had signed the bill of sale. He further said that if Miss Woodward should come to take possession of the furniture, he would notify the plaintiff, and the plaintiff assented to this.

On the plaintiff's case, the court dismissed the complaint, on the grounds that under the contract of storage the defendant was not bound to deliver the furniture to any one, except by the written order of Miss Woodward, in whose name and on whose account they were stored, and that the defendant, by his refusal to deliver the property to the plaintiff, did not wrongfully detain it.

George E. King for plaintiff and appellant.

D. Mc Mahon for defendant and respondent.

BY THE COURT.—SEDGWICK J.—The bill of sale did not reserve to the party making it the right of possession, but gave her a right of redemption. All else

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was given to the plaintiff, and she was entitled to the possession against the defendant.

The defendant's claim to withhold possession is not valid. It is placed upon the terms of the contract of storage, as contained in a storage receipt made by defendant. But the facts show that the furniture had been stored for more than two weeks before the defendant presented the special receipt, and its terms nowhere appear to have been assented to by the owner or her agent. Again, the defendant attempted to impose the special terms upon the general contract of storage, for the first time, on the occasion of the plaintiff's demand, for then first was the receipt of storage produced. Again, the receipt as drawn by him did not in its terms justify his refusal. The form of the receipt was such as to make it at least doubtful whether the special clauses were a part of any contract, or anything more than notice to the party storing goods. Under any circumstances, there would have to be evidence of assent to their provisions, and there was none in this case. But these clauses did not require absolutely a written order. They required either a written order (to be made by whom is not specified) or presentation of the original receipt. In this case the written receipt had been just presented by the defendant, and was there when the demand was made. The person with the plaintiff was the one who had made the delivery to the defendant, and was there to identify the plaintiff as the vendee named in the bill of sale. The defendant made no request to examine into the genuineness of the bill of sale.

If the former owner had at the time of storage made an agreement that the defendant was not bound to deliver except upon the written order of that owner, it would not justify the defendant in refusing to deliver to a person succeeding to the ownership until such a written order was procured. It was not a lien.

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It had no relation to the fact of title or ownership. Under no circumstances, was the defendant authorized to deliver to one not entitled to possession. The law gives him reasonable time to inquire if the party demanding the property is entitled to possession (*Ball v. Liney*, 48 *N. Y.* 6; *McEntee v. New Jersey Steam Co.*, 45 *N. Y.* 34). At the most, it is an agreement by the party assenting to it, a breach of which is without damage. In case of well founded doubt as to who is the owner, the bailee can bring his action in the nature of an action of interpleader (*Ball v. Liney*, *supra*), but for his convenience, or even for his interest, he should not be permitted to keep the owner's right dependent upon the action of a party who has ceased to have any interest to give the written order.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide event.

MONELL, Ch. J., concurred.

Statement of the Case.

LEMUEL B. CLARK, PLAINTIFF AND RESPONDENT, v. ISAAC J. GEERY AND HENRY B. SCHOLES, EXECUTORS OF WILL OF ISAAC GEERY, DECEASED, AND WALTER L. LIVINGSTON, RECEIVER, IMPLEADED, ETC.

I. PLEADING.

1. EVIDENCE UNDER.

(a) *Proving invalidity of an assignment of a claim.*

1. *A simple denial of an averment in the complaint that the claim or demand has been duly assigned to the plaintiff, will not let in evidence to establish that the assignment is invalid.*

II. FORECLOSURE.

1. INTEREST OF SUBSEQUENT LIENOR.

(a) *When rejection of evidence to show the nature of his interest is not error.*

1. When the existence of his lien and his right to dispute on the trial the amount claimed to be due on the prior lien are not disputed, and the trial of the issues joined resulted in determining the amount due thereon.

III. RECEIVER.

1. RIGHT OF, IN DEFENSE OF AN ACTION.

(a) *It is doubtful whether when he and the person for whose benefit he was appointed, and whose interests alone he defends, are both parties to the action, he can insist on a defense not insisted on by the party for whose benefit he was appointed.*

IV. EVIDENCE.

1. PARTICULAR ISSUE.

(a) *Party in interest.* Issue as to whether plaintiff, an attorney, or a third party against whom defendant has a defense, is the real party in interest.

1. The action being for a foreclosure of a mortgage, evidence that the plaintiff, while acting as attorney for one W. G., to whom the mortgagor had conveyed the mortgaged property, in an action brought against him by the executors of I. G. (defendants in the foreclosure suit), affecting the title to the mortgaged property, and which suit resulted

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in a judgment directing W. G. to convey to W. L. (also a defendant in the foreclosure action), as receiver for the executors of I. G., the mortgaged premises, took an assignment of the mortgage; and that while W. G. was the owner of the equity, one W., his son-in-law, had made payments on the B. & M. on his behalf, then ceased and put the mortgagee off, and finally told the mortgagee that the plaintiff had the money, appointing with him a time to go and see the plaintiff, and that W. and the mortgagee went to the plaintiff, who paid the consideration, and took the assignment, *is not sufficient* to establish that the assignment was taken for the benefit of W. G., or *to put the plaintiff on explanation.*

V. APPEAL.

1. COSTS ON.

(a) *Error below, what will not deprive respondent of costs.*

1. An error of calculation, such as giving interest on interest to which the attention of the court below was not called, will not.

Before MONELL, CH. J., and SEDGWICK, J.

Decided December 6, 1875.

Appeal from judgment.

Mr. Rice for defendants and appellants.

F. J. Fithian for plaintiff and respondent.

BY THE COURT.—SEDGWICK, J.—The complaint averred that a certain bond secured by mortgage had been made to one Hillenbrand; that the latter had assigned them to the plaintiff, and demanded the usual judgment of foreclosure.

The answer of the executors who appealed, made certain admissions, but denied that Hillenbrand had assigned the bond and mortgage to the plaintiff, and alleged that the bond and mortgage had been fully paid. Such were the issues made between the plaintiff and executors. The plaintiff did not dispute the

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existence of a lien, in favor of the executors, upon the surplus, and the executors did not dispute that the mortgage in question was a prior lien.

On the trial, the executors offered certain evidence as tending to show that the assignment was invalid, as against them, and as showing the nature of the interest of the executors. The offer was properly overruled, because the only issue as to the assignment was whether it, in fact, had been made as stated in the complaint, and because the trial of the issues that were made resulted in determining what was due upon the mortgage, which made it unimportant to show the nature of the executor's interest. It would have been proper to show such interest if the plaintiff had claimed that the executors had no right to dispute on the trial the amount claimed to be due to the plaintiff upon the bond and mortgage.

An examination of the case shows that the other appellant, Walter L. Livingston, receiver, did not appear upon the trial, but as he united in exceptions to the referee's report, and no objection was made to his being heard upon the argument of the appeal, we may consider the exception, in the light of the issues made by him.

His answer, stating its substance favorably to him, was that the mortgagor had conveyed the property to William Geery; that in an action brought by the executors named above, William Geery had been adjudged to convey the property to the defendant Livingston, as receiver; that while this action was pending, the assignment was made to the plaintiff, who was the attorney of William Geery, for the use and benefit of William Geery, if, in fact, the assignment was made. There was also a general denial of the allegations of the complaint, except as admitted by the answer, and a further allegation that if the mortgage was made, it had been fully paid.

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On the trial it appears that the executors offered in evidence the judgment-roll of the action, referred to in the answer of Walter L. Livingston, Receiver. It does not appear that any such offer was made in behalf of the Receiver; but if it had been made, the judgment should not be reversed on that account. If the judgment-roll had gone in evidence, it is said that there would be proof that the plaintiff took the assignment while he was attorney in that action for William Geery, who was the owner of the equity of redemption, and that the object of the action was to declare that the executors had an equitable lien upon William Geery's interest in the premises, and that judgment to that effect was given in favor of the executors. The evidence offered was relevant, in my opinion, to the defense that the assignment was for the use and benefit of William Geery. If we could see that the admission of the testimony would have supported a judgment that the assignment was for the use and benefit of William Geery, it would be doubtful that there should be a new trial, because so far as the record shows, the only interest of Livingston as receiver was to defend the claim of the executors, to satisfy their demand out of the proceeds of the premises (see *Bostwick v. Menck*, 40 *N. Y.* 383). So far as that was concerned, the executors defended for themselves, and made no defense of the kind now considered. I am, however, of the opinion that if the fact had appeared that plaintiff, Clark, was at the time the mortgage was assigned to him, the attorney of William Geery, the learned judge would not have been justified, upon the whole evidence, in finding that the assignment was for the use and benefit of William Geery. The only other facts in evidence on this point were, that while Geery was the owner of the equity of redemption, one Webster, his son-in-law, made payments on the bond in his behalf; then ceased to make further

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payments, and put the mortgagee off from time to time; then said to the mortgagee that the plaintiff here, Mr. Clark, had the money, appointing with the mortgagee a time when he should see Mr. Clark; that he went with Mr. Webster, and then Mr. Clark paid the consideration and took the assignment. Such testimony may create a surmise—a question—but is not strong enough to show that the money did not belong to Mr. Clark, or to put him upon explanation. Any different conclusion would be based upon the testimony, hearsay, as to the plaintiff, that Webster said Mr. Clark would pay the money, after construing that vague expression to mean that Geery had the money, but Mr. Clark would pay it over. The receiver, on this appeal, therefore fails to show that the exclusion of the testimony would have affected the result, or rather that if the testimony had been received, a judgment upon this issue in favor of the defense should have been sustained (*Tallman v. Bresler*, 58 *N. Y.* 123).

There was no defense, upon the pleadings that the plaintiff bought the bond and mortgage, with the intent, to put them in suit.

The learned judge, in computing the amount due, inadvertently gave interest upon interest. This arose from there being put in evidence a sum, which plaintiff paid for the mortgage, which included the principal and interest then due, and interest was calculated upon this gross sum. The judgment should be modified by deducting forty-three dollars and twenty-six cents, the amount of the error. This mistake, however, should not in this case (§ 306 of the Code, *Tallman v. Bresler*, *supra*) result in the respondent being deprived of costs. It might have been different if the attention of the judge had been pointed more specifically to the mistake.

I am of opinion that the judgment, when modified

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as directed, should be affirmed with costs to the respondent.

MONELL, Ch. J., concurred.

THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF NEW YORK, PLAINTIFFS
AND RESPONDENTS, v. THE NEW YORK AND
STATEN ISLAND FERRY COMPANY, AND
THE NORTH SHORE STATEN ISLAND
FERRY COMPANY, DEFENDANTS AND APPEL-
LANTS.

NEW YORK FERRIES.

The mayor, aldermen, and commonalty of the city of New York own the exclusive right of the ferry franchise in and about the island of New York.

Such right is not confined to ferries established at the time of the Montgomerie charter, but extends to and includes all other ferries which the corporation might thereafter establish from Manhattan or New York Island to any of the opposite shores (*Benson v. The Mayor, &c.*, 10 *Barb.* 223; *The People v. The Mayor, &c.*, 32 *Barb.* 102; *Milhan v. Sharp*, 27 *N. Y.* 619).

Benson v. The Mayor, &c. (*supra*), does not determine the question in respect to future ferries, but the right which that case held to be a vested right in the city, in respect to the established ferries continued and attached to all that were at any time afterwards established.

Any ferry operated and conducted from any part of the island to any opposite shore without the license of the corporation, is unlawful.

The Department of Docks have received no power from the legislature to grant a ferry license.

The status and powers of the Department of Docks are fully considered and reviewed in the opinion of the court.

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Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Appeal from an order continuing an injunction.

The action is to restrain the defendants, The New York and Staten Island Ferry Company, from conducting and running a ferry from New York to Staten Island ; and from using for such purpose any property of the plaintiffs leased to the defendants, The North Shore Staten Island Ferry Company, and to restrain the defendants, the said North Shore Staten Island Ferry Company, from further permitting or consenting to such use of said leased property.

The complaint alleges that under the plaintiff's ancient charters, it was given and granted "unto the mayor, aldermen, and commonalty of the said city of New York, and their successors forever, that the common council of the said city, for the time being, or the major part of them, (but no other person or persons whomsoever, without the consent, grant, or license of the said common council of the said city, for the time being, or the major part of them), from to time, and at all times hereafter, shall and may have the sole, full, and whole power and authority of settling, appointing, establishing, ordering, and directing, and shall and may settle, appoint, establish, order, and direct such and so many ferrys around Manhattan Island (now New York Island), for carrying and transporting people, horses, cattle, goods, and chattels from the said island of Manhattan to Nassau Island, and from thence back to Manhattan ; and also from the said island of Manhattan to any of the opposite shores all around the same island, in such and so many places as the said common council, or the major part of them, shall think fit. Who have hereby likewise full power to let, set, or

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otherwise dispose of, all or any of such ferries, to any person or persons whomsoever ;" and the rents, issues, profits, ferriages, fees, and other advantages arising and accruing from all and every such ferries, were thereby fully and freely, for the said crown, its heirs and successors, given and granted unto the mayor, aldermen, and commonalty of the city of New York aforesaid and to their successors forever, to have, take, hold, and enjoy the same to their own use, without being accountable to the said crown, its heirs or successors for the same or any part thereof. It is then further alleged that the defendants, or either of them, have not received from, nor has there ever been granted or leased to or conferred upon said defendants, The New York and Staten Island Ferry Company, and The North Shore Staten Island Ferry Company, or either of them, by the said board of aldermen of these plaintiffs, or the major part of them, or by any board, department, officer, or officers of these plaintiffs, any franchise, right, or privilege to run a ferry between said New York Island or any part thereof, and any point or points upon any shore around said Island ; nor have said board of aldermen, or any board, department, officer, or officers of these plaintiffs settled, appointed, established, ordered, and directed any ferry from said New York Island to any point or points upon any shore around said island to be carried on, run or conducted by said defendants, The New York and Staten Island Ferry Company, and The North Shore Staten Island Ferry Company, or either of them ; nor have these plaintiffs, or the said board of aldermen, or the major part of them, or any board, department, officer, or officers of these plaintiffs let, sold, or otherwise disposed of any such ferry or ferry franchises, or any rents, issues, profits, ferriages, fees, or other advantages arising or accruing from any such ferry, to the said defendant, The New York and Staten Island Ferry

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Company, or to the defendant, The North Shore Staten Island Ferry Company.

It is then further alleged that the said defendant, The New York and Staten Island Ferry Company, without lawful authority for so doing, are conducting and running a ferry from a point on the island of New York, at the foot of Whitehall street, in the city of New York, to a point on the easterly shore of Staten Island, near the foot of Canal street, in the village of Edgewater, and known as Stapleton Landing, and by means of said ferry are carrying and transporting people, goods, and chattels from said New York Island to said point on Staten Island, and from said point on Staten Island back to said New York Island, and are receiving and taking to their own use, rents, issues, profits, ferriages, fees, and other advantages arising and accruing from said ferry.

It is then further alleged, that the defendants claim that by an instrument of lease between the plaintiffs and The North Shore Staten Island Ferry Company, made in March, 1874, the plaintiffs leased to said company, for two years, Pier No. 1, East River, etc.

That the Department of Docks, one of the departments of the city government, at the time of making the aforesaid lease, *claimed* to have and exercise the power of making such lease, and did resolve that the said The North Shore Staten Island Ferry Company be granted a lease of said property, provided the company should deliver its written agreement to occupy said premises only for ferry purposes. Such agreement was delivered.

That subsequently the said Department executed the lease upon those terms, but in the name of the plaintiffs. It was provided in the lease that the demise was subject to all ordinances of the plaintiffs, then in force, or which might thereafter be adopted by them, and all laws of the state.

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The lease provided, and The North Shore Staten Island Ferry Company therein and thereby agreed with the plaintiffs, that if they, the said North Shore Staten Island Ferry Company, should at any time during the term mentioned in said instrument in any manner, directly or indirectly, grant or demise the premises or any part thereof, thereby granted and demised to any person or persons whomsoever, or in any way charge or incumber the same without the leave and consent of these plaintiffs first had and obtained in writing, and executed in due form of law, that in such case the said instrument and all conditions, agreements, stipulations, and provisions therein contained should cease, determine, and be utterly void, anything therein contained to the contrary notwithstanding.

The rights and premises demised are as follows: "All that certain pier known as number one, East River, and the eighty-one and one-half feet of bulkhead, situate lying and being between said pier and the westerly side of the small pier located between piers number one and two, and also the westerly half of said small pier, which said wharf property is located in the city and county of New York, and described upon a map or diagram hereto annexed, and colored red, which said map or diagram is to be taken and considered a part of this indenture: the said premises hereby granted and demised to be used only for ferry purposes; and the said parties of the first part hereby authorize the said parties of the second part, their successors or assigns, to enter upon the said premises, and take possession of the same at the time herein designated, and for the purpose herein set forth, and to hold and enjoy the same, subject to all the ordinances of the mayor, aldermen, and the commonalty of the city of New York, now in force, or which may hereafter be adopted by the said mayor, aldermen

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and commonalty, and all laws of the State of New York.”

The complaint further alleged that the plaintiffs had not, in writing, given their leave and consent, that the said North Shore Staten Island Ferry Company might in any manner, directly or indirectly, grant and demise the premises or any part thereof, to any person or persons, or in any way charge or incumber the same.

It is then alleged that the defendant, The New York and Staten Island Ferry Company, is now using the said premises for the purpose of conducting a ferry therefrom to Staten Island, and that the defendant, The North Shore and Staten Island Ferry Company, are permitting such use.

In the answer of the defendants, it is alleged, that in January, 1875, the defendant, The North Shore Staten Island Ferry Company, duly obtained from the Department of Docks, a written permission or consent to sub-let to The New York and Staten Island Ferry Company, a portion of the said demised premises, for the use and purpose that said company might run a ferry to and from New York and Staten Island, for the transportation of passengers, goods, &c., and that thereupon said defendant duly leased, in accordance with the permission or consent of said department a portion of the premises to the latter company.

The lease to The North Shore and Staten Island Ferry Company, although purporting to be in the name of the plaintiffs, is witnessed and executed as follows:

“In witness whereof, the said The Department of Docks has caused these presents to be executed, in conformity with its by-laws, by the president, treasurer, and secretary of the said department, for and in behalf of the said mayor, aldermen, and commonalty of the city of New York, and the said party of the second

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part has caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president, treasurer and secretary, the day and year first above written.

“WM. P. VAN ALLEN,
“N. S. S. I. Ferry Co. } President.
Seal. } W. H. PENDLETON.
Secretary and Treas.

“The word ‘part’ on the 23d line, 6th page, interlined before execution.

“JACOB A. WESTERVELT,
“Witness: President.
WM. W. BURNHAM. W. BUDD,
Treasurer.

Department of Docks }
Seal. } EUGENE F. LYNCH,
Secretary.”

The permission to sub-let is contained in the following:

“At a meeting of the board governing this department, held this day, the following resolution was adopted: Resolved, that permission be and the same is hereby granted to the North Shore Staten Island Ferry Company, lessee of ferry premises foot of Whitehall street, E. R., to sub-let a portion of the same to the New York and Staten Island Ferry Company, to be used by said last mentioned company conjointly with said lessees in the business of transporting passengers and freight between Staten Island and New York.

“Very Respectfully,
“EUGENE F. LYNCH,
“Secretary.”

A motion to continue the preliminary injunction *pendente lite* was granted at special term.

The defendants appealed.

S. S. Harris for appellant.

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William C. Whitney, corporation counsel, and *H. E. and J. D. Davies*, for respondents.

BY THE COURT.—MONELL, Ch. J.—The appellants claim the franchise in question under one or other, or both, of the following propositions.

First. That there is no exclusive right of ferriage in the plaintiffs; but that as to any ferry not in being at the granting of its ancient charters, the right is common to all citizens; or,

Second. That the lease and permission of the Department of Docks vested the right of ferriage in the defendants.

A brief examination of the several charters under which the plaintiffs claim the exclusive right of ferriage will suffice to establish such right.

Dongan's charter (1686) was a general grant of liberties, privileges, franchises, rights, royalties, free customs, jurisdictions, and immunities, with a special confirmation of one ferry which had then been established.

The Cornbury charter (1808) granted to the mayor, &c., full and free leave, &c., to establish and maintain one or more ferry or ferries, as they shall from *time to time* see fit, between the city and the adjoining shore of Long Island.

But the Montgomerie charter (1730) was a grant (§ 15 *Valentine's Laws*, 227) and confirmation to the mayor, aldermen, and commonalty of the city of New York, and their *successors forever*, "of the sole, full, and whole power and authority of setting, appointing, establishing, ordering, and directing . . . such and so many ferries around Manhattan Island, alias New York Island, for carrying and transporting people," &c., from said island to *any of the opposite shores*, all around the same island, in such and so many places, as the common council should think fit,

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granting to the said mayor, &c., all the rents, issues, profits, ferriages, fees, and other advantages arising and accruing from all such ferries.

And by the 37th section of the same charter (p. 243) there is a further grant and confirmation of the ferries then established, and "*all other ferries* now and hereafter to be erected and established all around the island," with the fees, ferriages and perquisites of the same.

There is also (§ 40) a covenant to the mayor, &c., and *their successors*, of quiet and peaceable enjoyment of all the granted privileges, immunities, and franchises.

The plain and explicit language of those grants admits of no doubt that the mayor, &c., of New York became vested with all the rights which then resided in the crown in the several franchises granted; and it is equally clear that the grant was of all ferries then existing *or thereafter to be established*.

It is a question, however, whether the crown could grant to a municipality a right which, so far as it is a public right, belonged to the people.

The sovereign power was at the time of those charters, in the crown; and as there was nothing in *magna charta* to qualify or restrict the power of the sovereign in respect to it, the grant was complete, and divested the people of any right which they could claim the enjoyment of. The sovereign will was paramount, unrestricted, irresponsible to the people, and the rights of the people were subservient to it.

That a different and much less power resides in the sovereignty of the state of a republic, affords no reason for confining or abridging the powers of the sovereignty of Great Britain. The former is limited by organic laws, in and by which, the people, having parted with only a portion of their own sovereignty, have thrown around themselves limitations and restrictions for their own security and protection.

The provision of our state constitution, that the people, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state (Art. 1, § 11) contains in words the principle which clothed the sovereignty of Great Britain with a similar right when the ancient charters were granted and which covered not only property in lands, but in all other things, corporeal and incorporeal, which did not belong directly to the people.

I do not think it necessary to further pursue the inquiry whether a ferry franchise could be the subject of an *exclusive* grant. It is too palpable, and has received sanction and assent too long, to be open to question now.

I do not intend by this to say that the city has acquired under her charters so exclusive a right to establish ferries that there can not be any interference with it by the legislature. That question will be briefly discussed further on. But I do mean, that *until* deprived of such exclusive right by some competent power, the city was granted the sole and exclusive use of the franchise of ferries, and was entitled to maintain or license them for its sole benefit and emolument.

These several ancient charters, and especially the charters of Dongan and Montgomerie, were recognized and adopted throughout the whole of the colonial government, and have been frequently ratified and confirmed by subsequent legislation. More especially the Montgomerie charter, which, as Chancellor KENT says (*Kent's Notes on Charter*, 212, N. 19), is the charter upon the foundation of which the city of New York is at present governed.

The long, frequent, and uninterrupted use of the franchise by the corporate authorities, their, until now, unquestioned right to the exclusive use and

enjoyment of it, with its perquisites and emoluments; and the implied, if not actual, sanction of legislatures, the courts, and the people, establish a right, even independent of these charters, which should not lightly be set aside.

The sanction of the legislature is found in the enactment that the charters known as the Dongan and Montgomerie charters, so far as they are in force, shall continue and remain in full force, and shall not be construed as repealed, modified, or in any manner affected (Act 1853, chap. 217, § 54).

The courts have upheld the plaintiff's claim to the franchise in the following cases: *Benson v. The Mayor*, 10 *Barb.* 223; *The People v. The Mayor, &c.*, 32 *Barb.* 102; *Milhau v. Sharp*, 27 *N. Y. R.* 619.

The conclusion, therefore, must inevitably be, that the plaintiff owns the exclusive right of the ferry franchise in and about the island of New York, and that such right is not confined to ferries established at the time of the Montgomerie charter, but extends to and includes all other ferries which the corporation might *thereafter* establish from Manhattan or New York Island to any of the opposite shores. I am aware that *Benson v. The Mayor, &c.* (*supra*) does not determine this question in respect to future ferries. It was not necessary in that case that it should; but for reasons which will be found in the discussion hereafter of the second proposition, the future as well as the present was covered by the charter, so that the right which *Benson v. The Mayor* held to be a vested right in the city, in respect to the established ferries, continued and attached to all that were at any time afterwards established.

It follows from this view of the law that any ferry operated and conducted from any part of the island to any opposite shore, without the license of the plaintiff, is unlawful.

The *second* proposition is perhaps of more difficulty. Part of it involves considerations and questions of which the decisions are not uniform, and upon which a reasonable doubt attaches.

The defendant, The North Shore Staten Island Ferry Company, claim the franchise under a lease or license from the Department of Docks, one of the departments of the city government,—and the other defendants justify under the written permission of the same department.

Two questions arise under this proposition: The one involves the powers of the Department, and the other the competency of the legislature to grant the power if it exists.

The Department of Docks was constituted under the Act of 1871, which is amendatory of an act to reorganize the local government of the city of New York (*Laws* 1871, chap. 574).

Section 6 of the act defines the powers of the Department. The board is to be appointed by the mayor, and they were to possess such powers and perform such duties as should be established and defined by the commissioners of the sinking fund of the city. The Department is then given exclusive “charge and control . . . of all the wharf property belonging to the corporation . . . including all the wharfs, piers, bulkheads, and structures thereon, and waters adjacent thereto, and all the slips, basins, docks, water fronts, land under water and structures thereon, and the appurtenances, easements, uses, reversions, and rights belonging thereto, which are now owned or possessed by the said corporation.” Power is also given to lease any of the above mentioned property.

The Act of 1873 (chap. 335) continues the Department with its powers, and by section 26, it is made a department of the city government. The powers thus defined and expressly given are sufficiently compre-

hensive, as was said in *Hoeft v. Seaman* (38 *Sup'r Ct. R.* 66), to extend over the dock property of the city, and over the slips, basins, and adjacent waters ; and includes the power to grant leases of such property.

If, therefore, the lease to the North Shore Staten Island Ferry Company had been of the pier, slip, or basin for any commercial purpose, or for a purpose connected with the ordinary use of such structures or spaces, and not extending beyond such ordinary use, it would have been within the powers of the Dock Department, and not an invasion of any vested right of the corporation. Such a power over the described property may be said to be expressly given, although the use to which the lessee may put the premises is not defined or limited. But, as was held in *Hoeft v. Seaman* (*supra*), the power of the Department over waters adjacent to the piers or wharfs is subservient to the public use, and if given in excess of the public right to use such waters, it would be invalid.

It is a well settled principle in the construction of statutes that the authority it confers can not be stretched or extended beyond the intent ; and where the language is clear, the letter of the statute will indicate the intent. This is especially so where conferred powers are named and described in the statute. In such a case no power can or will be implied, except, perhaps, such as may be necessary for the exercise of those expressly given. To that extent only will the statute be enlarged to let in incidental or implied powers.

The lease of the Dock Department to the North Shore Staten Island Ferry Company is of one of the piers and part of the bulkhead belonging to the city. Had that been the extent of the demise, it would probably have been within the competency of the Department to have made it. It would have given the lessees the right to use the pier and bulkhead for any purpose

connected with the commercial use of such property and its adjacent waters, with the single limitation that it was not so far exclusive as to interfere with the public use of the navigable waters about it.

But the demise declares that the premises granted are to be used only for *ferry* purposes, and authority is given to the lessees or grantees "to enter upon the said premises and take possession of the same . . . for the purpose herein set forth." If this was not in express terms a *grant* of a ferry, it was at least a license to the ferry company to use the pier and bulkhead in operating a ferry from the shores of the city to surrounding territory, which the company had done since the demise was made, without any other grant or license whatever.

Not only is the ferry franchise not named among the objects over which the Dock Department is given control, but it is not even an incident or appurtenant to any of them. Such a franchise is property, having a distinct and separate entity, capable of being granted, demised, and enjoyed, and of being dissevered from other property; and it may exist without the coincidence of ownership of the riparian right.

Of course a landing-place at each terminus of a ferry is essential to its beneficial use; but the landing places and ferry franchise are so far separate property that the one may belong to the riparian owner, and the other to the sovereignty of the state, or a municipal corporation, or an individual.

This distinction of property is recognized in *Doty v. Gorham* (5 *Pick.* 487), and in *Chambers v. Furey* (1 *Yeates' Reports*, 16), where it was held that the owner of a ferry over a navigable stream had no right to land or receive freight on the adjoining banks, even though the landing place was a public highway, without the owner's consent. It was there said the dedication of ground for the purpose of a public road gave no right

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to use it for the other purpose. This doctrine was afterwards recognized in *Cooper v. Smith* (9 *Serg. & Rawle*, 26). This, however, is probably not the rule in England, if the ferry landing is a public highway. It was so held in *Petre v. Kendall* (6 *Barnw. & Cress*, 703), where the King's Bench said the owner of a ferry need not have the *property* in the soil on either side. It was sufficient that the landing place was a public highway.

The same distinction is preserved in our statute in relation to the regulation of ferries (1 *R. S.* 526), which requires the grant or license to be given to the owner of the land through which the highway adjoining a ferry shall run, unless upon notice he shall fail to apply for it.

It will be seen, therefore, that a ferry or a ferry franchise does not depend upon or require a conjunction of ownership of the ferry and the land. A right of ferryage may, and frequently does, exist independently of the ownership of the adjoining land, and, as such is separate property, capable of a separate grant.

It is true that to ferry is a right properly appertaining to the soil, and attaches to the riparian proprietor, of which he can not be deprived except by the right of eminent domain.

But it has never been questioned, that the state, the sovereign power in which resides the original and ultimate property in all lands, could, in the exercise of its right of eminent domain, by making just compensation, condemn to the use of a public ferry the land of the riparian owner. The private grants or licenses of ferries made by the legislature under its right of eminent domain, are found in the statute book by the hundred, and the provisions of the *Revised Statutes* before referred to, for acquiring a landing-place, was enacted under the same right of eminent domain.

If, therefore, the several reasons which have been fur-

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nished, establish so complete a separation between the ownership of the riparian proprietor, and the ownership of a ferry franchise, that they may be owned and possessed as separate property, it must follow that the franchise is not a necessary incident or appurtenant to the land, and whatever may be the right or interest of the riparian owner—short, perhaps, of an exclusive and vested right—it may be made to yield to the power of the state in the exercise of its right of eminent domain.

Under this state of the law, the powers of the Dock Department over the pier and wharf property of the city may be exercised without interfering with the other and separate property of the city, and leases may be made for the use of piers or wharfs and the adjacent waters within, and for the general commercial purpose of such property, without divesting the city of any of its right and title to any of its ferry franchises or other property.

It is clear that there was no express power—and none can be implied—given to the Dock Department to license a ferry. Its functions were at an end when it leased the pier and bulkhead. It could not extend, directly nor indirectly, nor by implication, the use of the structure to a purpose that would interfere with the enjoyment of any public or private right.

The language used by the legislature, in prescribing the powers of the Dock Department might very easily have included a power to grant ferry licenses, and given it in express and unmistakable terms. That would have settled the question of the intent of the legislature, and left only the question of the competency of that body to take from the corporation, as an entirety, its right over the franchise, and bestow it upon one of the arms or agencies of the city government.

But *ferries* are not mentioned in the statute; and it is not to be presumed that the legislature intended by any implication, or by any meaning which the law

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may give to such words as "appurtenances, easements, uses and rights belonging thereto," to confer a power beyond that which is appurtenant to a dock or wharf, or an easement or use connected therewith, of which a ferry is neither.

The intention of the legislature is also to be found in subjecting the Dock Department to some—and in respect to ferries, to a sufficient extent to the supervisory or directory power of the commissioners of the sinking fund (§§ 1, 2, *Laws of 1871*, ch. 738).

Prior to the act of 1871, the commissioners of the sinking fund had by statute and city ordinance (ch. 876, *Laws of 1869*, § 8; ch. 9, *Revised Ordinances*, § 28), charge of all the city property, including ferries; and it must be presumed that it was in view of such custody or authority over the ferries, that the legislature guarded against the implication of any power over them in the Dock Department.

Having reached the conclusion that the legislature has not given to the Dock Department a power to grant a ferry license, it is not necessary to examine or discuss the question which was so largely discussed on the argument as to how far the legislature could or can divest the corporation of its exclusive right of ferryage.

Nor do I think the question is fairly, if at all, presented in this case.

Even assuming that the power claimed had been given to the Dock Department, it would not be a divesting of the corporation of any of its property, unless it can be claimed that such department was created without the consent or ratification of the city. But I think enough has been done by the city under the act constituting that Department to show its consent to and acceptance of the act.

The Department of Docks is made a department of the city government. It is one of the agencies through

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and by which the functions of that particular department of the city government are performed. And as all the functions of a municipal government must be performed through and by agencies, there can be no reason why the legislature may not create such agencies, especially if it is done with the consent and sanction of the city.

I am not prepared, except in those cases where rights are protected by constitutional provisions, to concur in the views expressed in *Benson v. The Mayor* (*supra*), that a municipality can possess a vested right in a property of this character, or that it can not be divested by the legislature. Certainly the force of that decision has been considerably examined and discussed in *Darlington v. The Mayor, &c.* (31 *N. Y. R.* 164), and in *The People v. The Mayor* (32 *Barb.* 102). Indeed, *Benson v. The Mayor, &c.*, did not hold that the vested rights of the city in ferries extended beyond those already established; and the learned judge said that the question of the right to establish new ferries by a legislative grant was not then before the court, and it was not passed upon.

But I do not propose to examine the question.

A remaining objection is, that the plaintiffs do not show such an injury resulting, or likely to result, to the city by the operating and continuing the ferry, as is required to be shown under section 219 of the *Code*. Such section is to the effect that it must appear by the complaint that the commission or continuance of the act sought to be restrained will produce injury to the plaintiff.

The allegation in the complaint is that the defendants, the New York and Staten Island Ferry Company, are conducting and running the ferry, and that the other defendants, the North Shore Staten Island Ferry Company, are unlawfully inciting and permitting such use of the property of the plaintiffs "to the damage of

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the plaintiffs in their rights and property." And also that the former company is receiving and taking to their own use the "rents, issues, and profits, ferriages, fees, and other advantages arising and accruing from such ferry."

These allegations are, perhaps, a little too general, but I think them sufficient as a pleading; and if they are not, may be amended so as to be made to conform to the facts.

The damage to the plaintiffs is the loss of the emolument it is entitled to receive from the ferry, either in ferry or license fees. As owner of the franchise, the ferry could, probably, be operated by the city, and the fees and income would go into the city treasury. Or it might grant a license, and receive the license fee. If, therefore, the city is deprived of either, or of any part, of this emolument by the unlawful usurpation of the franchise by the defendants, it would be a sufficient injury to authorize the restraint.

It certainly is as full, both in the form and substance of the allegation, as in *Fellows v. Heermans*, cited in the opinion of the court in *Erie Railway Co. v. Ramsey* (45 *N. Y. R.* 645).

It is no sufficient answer to this, that the lease by the Department of Docks reserved a certain rent payable to the city. As the city repudiates the act of the Department, the rent reserved can not be taken to satisfy the damages which the city may claim by reason of the unauthorized act of the defendants. Nor is it an answer that as the city has not as yet established a ferry at or from the point occupied by the defendants, it can not sustain an injury by the usurpation of the defendants. It is enough that the defendants are using the city property, and depriving the latter of an emolument which it is entitled to receive, and which it would receive if the license had emanated from the city.

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My conclusion is, that the order appealed from should be affirmed, with costs and disbursements to be taxed.

CURTIS, J., concurred.

THE TRIBUNE ASSOCIATION, PLAINTIFF AND
RESPONDENT, v. A. BURDETTE SMITH, DE-
FENDANT AND APPELLANT.

POSTPONEMENT OF TRIAL.

An exception to a decision denying a motion to postpone a trial, is available upon an appeal from the judgment in the case (*Gregg v. Howe*, 37 *Sup'r Ct. R.* 420).

All the facts sworn to that were urged upon the motion, as also all the facts stated orally to the court, upon and in opposition to the motion, are evidence for the consideration of the court on appeal, and are clearly admissible.

The party objecting to the postponement of the trial, can require all such statements of facts to be put into the form of an affidavit, and he is not bound to accept them otherwise, if he insists upon their verification.

But if oral and unverified statements of counsel are not objected to because they are not in writing, and verified, and such statements are not contradicted, they are competent as evidence, and are entitled to the same credence as if embodied in an affidavit.

Where there is a conflict in the proofs before the court below, upon such a motion, the judge is as competent, and better able, to determine the facts than the court on appeal can be, and his decision, like the verdict of a jury, will not be disturbed.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 8 1876.

Opinion of the Court, by MONELL, Ch. J.

Appeal from a judgment.

Upon the call of the action for trial at the jury term, the defendant moved the postponement of the trial. He read several affidavits showing the absence of a material witness.

Affidavits in opposition were read by the plaintiffs, and their counsel also made certain oral statements, which, as the case states, "were uncontradicted by the defendant."

The court denied the motion to postpone. The defendant, after having excepted to the decision of the court, withdrew from the trial, and the plaintiffs took an inquest.

The defendant made a case containing the proofs that were before the court upon the motion to postpone the trial, the decision of the court thereupon, and his exception.

He also appealed from the judgment.

W. M. Rosenblatt for appellant.

C. D. Adams for respondents.

BY THE COURT.—MONELL, Ch. J.—We held, in *Gregg v. Howe* (37 *Sup'r Ct. R.* 420), that an exception to a decision denying a motion to postpone a trial, was available upon an appeal from the judgment. The appellant has brought himself within that decision, and is, therefore, entitled to be heard.

In the case referred to, the court had before it, in hearing the appeal, only the affidavit of the moving party; and as that was *prima facie* sufficient, and there were no circumstances of suspicion appearing, we thought that the judge at the trial term ought to have granted the motion. It did not appear what facts, if any, were stated or verified in opposition to the motion; and in the absence of such facts appearing in the case,

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we were bound to assume that nothing was stated in opposition. But as we felt authorized to believe that the court did not arbitrarily dispose of the motion, but had some foundation of fact for its decision to rest upon, and that the omission of such facts from the case was probably the result of accident or an insufficient appreciation of the importance of inserting them, we deemed it proper to direct attention to the subject, and suggested that care should be taken to see that the case contained all the facts before the court when the decision was made.

The suggestion has been adopted in the case now before us, and we are put in possession of all the facts sworn to, or orally stated to the court, upon and in opposition to the motion.

The appellant objects to the oral statement made by counsel, and claims that as it was not made under oath, it should not have been received as evidence.

We strongly intimated in *Gregg v. Howe*, that such statements were clearly admissible, and we now affirm that position.

It is always competent to require such statements to be put into the form of an affidavit, and no one is bound to accept them otherwise if he insists upon the right to require them to be sworn to. But if oral and unverified statements of counsel are not objected to on the ground that they are not in writing and verified, and are not contradicted, they are not only competent as evidence to oppose an application of this nature, but are entitled to the same credence.

I have examined the facts the learned judge had before him when he denied the defendant's motion, and I am satisfied he committed no error.

It appears that the first postponement was in February, for a fortnight, to enable defendant to get ready for trial. The cause was called again in March, and the defendant expressed his desire to amend his

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answer, and the trial was put off. A motion to amend was granted, but on terms unsatisfactory to the defendant, and he appealed from the order. When the cause was called on May 10, the pendency of the appeal, after an ineffectual attempt to obtain a stay of proceedings at special term, was made the objection to going to trial, and the court overruled it. The next day the same objection was re-stated, with the additional reason, that the defendant's counsel was elsewhere engaged. The objections were again overruled, and the cause held for trial when reached on the day calendar. On the 12th, the defendant's attorney made affidavit of the absence of a material witness, whose absence he had discovered only on the *previous* day. And the defendant, in an affidavit of May 11, stated that he had *that day* made inquiry, and had ascertained that his witness had been absent two weeks in North Carolina.

A most essential element in an application to postpone a trial is to show diligence in procuring the attendance of witnesses. No such diligence was shown by the defendant in this case. Suitable vigilance would have procured the witness's conditional examination or his attendance.

To vary the reasons for a postponement on different days very naturally raises a doubt of the good faith of the application, and will frequently be deemed sufficient to defeat the motion.

Apparently, the absent witness was not brought in as a ground for postponement until a last resort. The pendency of the appeal and the absence of counsel, had on consecutive days been ineffectual, and then at the last moment, an affidavit, which lacked showing due diligence, was pressed into the defendant's service.

Where there is conflict in the proofs before the court below, the judge is quite as competent to determine the facts, and better able than the court in *banc* can be.

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And his decision as to the facts, like the verdict of a jury, will not be disturbed.

I am satisfied the learned judge in this case came to a correct conclusion, and committed no error in denying the defendant's motion.

The judgment appealed from should be affirmed.

CURTIS, J., concurred.

JOHN SCHREYER, PLAINTIFF AND APPELLANT v.
THE MAYOR, ALDERMEN, AND COMMON-
ALTY OF THE CITY OF NEW YORK, IM-
PLEADED, &C., DEFENDANTS AND RESPONDENTS.

ASSIGNMENT OF A CLAIM OR INSTALLMENT UNDER A
CONTRACT.

When an order to pay when due, and notice of same, operates as an assignment or appropriation of the installment, so far as any such order or notice must be regarded as binding upon, or appropriating, the fund, or part of the fund, it can not by any legal construction be extended or postponed to any other or subsequent payment or installment than the one specified in the order.

Such an order is at the most only a mere equitable assignment of a part of a future fund, and does not operate upon the same until accepted by the drawee. Judgment of the court below corrected, by adding to it the amount the plaintiff should have recovered, in accordance with 85 *Sup'r Ct. R.* 423, affirmed by Court of Appeals, 55 *N. Y.* 452.

Before MONELL, CH. J., and CURTIS, J.

Decided January 8, 1876.

Appeal from a judgment.

Statement of the Case.

The action was to recover upon a contract made between one Dutch and the defendants, for work and materials furnished to the defendants, the price being payable in eight installments.

The complaint alleged that on April 4, 1873, Dutch made and delivered the following order :

“New York, April 4, 1873.

“To the Board of Public Instruction.

“Please pay to Dannat & Brother, or order, the sum of thirteen hundred and fifty dollars, when the same shall be due me on next payment, and charge the same to the account of my contract for Tenth Ward Public School, situated in Ludlow street, near Delancey street, and much oblige,

“Yours respectfully,

\$1,350.00

“ALONZO DUTCH.”

That on the 4th or 5th April, the said Dannat & Brother presented said order for acceptance or payment to the department of the defendants upon which this order was drawn, and at the request of said department left the same with such department. That said Dutch received and was paid by the defendants the *sixth* installment upon said contract ; and thereafter and before the *next* or *seventh* installment became due and payable, made and delivered the said order to Dannat & Brother. That notwithstanding said order and notice of it to the defendants, they, the said defendants paid the said *next* or seventh installment, when the same became due, to the said Dutch.

That afterwards said Dutch, becoming unable to complete his said contract and to become entitled to the last or eighth installment thereunder, duly assigned and transferred the said contract to the plaintiff with the consent and acquiescence of all the parties thereto. That the plaintiff thereupon completed the work under said contract, and wholly earned the whole of said last or eighth installment.

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The only defense was that the defendants had the right to withhold, out of said eighth installment, a sufficient amount to pay the order to Dannat & Brother.

It was proved on the trial that Dannat & Brother had sued the defendant upon their order to recover the seventh installment, which they alleged in their complaint was the *next* payment mentioned in said order; and that the court in that action had dismissed the complaint. It was further proved, that the plaintiff, after receiving the assignment from Dutch, served a notice thereof on the Board of Education, and they attached the notice to the contract. That thereupon he went on and completed the work under the contract, and earned the whole of the last or eighth installment, amounting to three thousand dollars.

The plaintiff also read in evidence the order of Dannat & Brother, set forth in the complaint, which was attached to the certificate, relating to the seventh payment, instead of the eighth coming from the Comptroller's offices, with all the certificates showing the performance of the work for the seventh payment, to show that at the time the payment was made it was attached to the certificates authorizing the payment.

The court directed the jury to find for the plaintiff, and to ascertain the amount he was entitled to receive by deducting from the entire amount of the eighth installment, being three thousand dollars, one thousand two hundred and seven dollars, the amount of Dannat's bill, with interest from July 16, 1873, the time of the seventh payment, to August 9, 1873, the time of the filing of the assignment to plaintiff, and that upon this balance the plaintiff was entitled to interest from November 12, 1873, the date of the completion of the contract.

The plaintiff's counsel excepted to the direction of the court, and asked the court to direct the jury to find a verdict for the plaintiff, for three thousand dol-

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lars principal, and three hundred and ninety-seven dollars and eighty cents interest. Refused. Exception by the plaintiff.

The jury accordingly returned a verdict for plaintiff for one thousand nine hundred and thirty-six dollars.

The plaintiff appealed.

D. M. Porter for appellant.

F. L. Stetson for respondents.

BY THE COURT.—MONELL, Ch. J.—The defendants stand somewhat in the attitude of a stakeholder, having funds belonging to the plaintiff, or to Dannat and Brother, and not knowing to which to pay them.

The corporation could have interpleaded between those parties and had it determined, probably, without expense to itself, which of them was entitled to be paid. The same thing, except the saving of expense, can be determined in this action; so far only, however, as the plaintiff's rights are concerned. Dannat and Brother not being a party hereto, will not be concluded by the judgment.

The equities of the case are strongly in the plaintiff's favor. He took an assignment of the contract, after Dutch had shown his inability to complete the work; went on and finished it—the corporation reaping all the benefit—and earned the whole of the last or eighth installment, amounting to three thousand dollars.

The case turns, however, upon the effect to be given to the order of April 4th, which was a direction to pay Dannat & Brothers, thirteen hundred and fifty dollars, "when the same shall become due me on next payment."

When the order was drawn and delivered to the defendants, the *seventh* installment or payment on the

contract, had not been earned, nor was it due or payable. And it is claimed by the appellant that the order operated as an assignment or appropriation of that installment, when it had been earned, and had become due and payable. And that after notice of the order to the defendants, the payment by them to Dutch of such seventh installment, was in their own wrong. Therefore, inasmuch as the order was an assignment or appropriation of the seventh installment, it should have been paid out of that installment, and was not a lien upon, nor had it a right to be paid out of, the eighth installment.

The respondents, however, insist that the order had reference to the *time* of payment, and not to any particular fund out of which it was to be paid. That it was payable *when* the *next* or *seventh* installment became due, but not absolutely or necessarily out of that payment.

But I do not think this latter construction can prevail.

It is conceded that at the date and notice to the defendants of the order, the "next" or seventh payment had not been earned, nor was it due under the contract. Then when it became due the order also, according to the respondents position, immediately became due, and if then paid, it must necessarily have been paid out of such seventh payment.

If, however, it was entitled to be paid out of any other payment that might thereafter become due, then the payment to Dutch was not unauthorized.

That the contractor made his order payable "when" the next payment became due, is conclusive that he intended it should be paid out of such payment, and the drawees of the order must have intended to demand payment out of the installment which next fell due after its date. And such is the construction they put upon their order in their unsuccessful suit with the corporation.

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Upon this branch of the case, I am of the opinion that so far as the order was available for any purpose, it must be regarded as binding or appropriating the fund, or a part of the fund, which was to be represented in the *seventh* installment thereafter to fall due under the contract, and can not by any fair or legal construction be extended or postponed to any other or subsequent payment. Such was clearly the intention of all the parties; and if the corporation has through accident or mistake, or otherwise, unintentionally disposed of the seventh payment, to the prejudice of the holders of the order, it must suffer the loss, if it be a loss, and not seek to impose it upon the plaintiff.

If my views of the effect which should be given to the order are correct, the plaintiff should have been allowed to recover the whole of the last or eighth payment due upon the contract.

But another reason is perhaps more conclusive.

The order in favor of Dannat & Brother was not in the nature of an inland bill of exchange. At most it was a mere equitable assignment of a part of a *future* fund. If the fund had been in existence, then, perhaps, the assignment would have operated from the time of notice. But even that is doubtful.

In *Gibson v. Cook* (20 *Pick.* 15), a person entitled to quarterly payments drew upon his trustee to pay a creditor, "as the drawer's income should become due." The trustee refused to accept, and it was held that the order was not an assignment.

In *Mandeville v. Welsh* (5 *Wheat.* 626) it was held, that an order for part of a fund does not amount to an assignment.

And in *Cowperthwaite v. Sheffield* (1 *Sandf.* 416) the action was upon clear bills of exchange, and it was shown that they were drawn upon shipments of cotton. The court says, "where an order is drawn, either on a general or a particular fund, for a part of the fund

only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation, *by an acceptance of the draft*. Had the bills been in the form of orders, they did not embrace the entire amount, and could not have amounted to an assignment, or give a lien, unless *accepted*."

Numberless cases to the same effect might be cited, and they all establish the general doctrine that even an equitable assignment does not operate upon the fund, or create any lien, until *accepted* by the drawee.

It is not claimed by Dannat and Brother that their order was *accepted* by the defendants. At most, as it is alleged, notice of the order was given and received by the defendants.

That was not enough to create any lien upon the fund, or fix any liability upon the defendants, under the Dannat order.

In either aspect of the case therefore, the eighth payment upon the contract is due to the plaintiff. If the order was an appropriation of the seventh payment, it could not and can not rightfully be paid out of the eighth payment; if it was intended to operate upon any of the payments, for the reasons stated, it failed to become a lien, or create any liability against the defendants, because of its *non-acceptance* by them.

Another reason why, under all the circumstances, the plaintiff is entitled to receive the whole of the *eighth* installment, is, that when he took upon himself, as the assignee of the contract, the expense and labor of finishing the work under it, he was accepted by the defendants as the contractor, and the work he has bestowed and money expended has inured to the extent of three thousand dollars, to the benefit of the city. So that, whatever success the defendants may have in defending against the Dannat order, they should not, in conscience, be allowed to interpose any

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such possible liability, between themselves and so just a creditor as it is conceded the plaintiff is.

In *Canaday v. Stiger* (35 *Sup'r Ct. R.* 423, affirmed *Ct. of App.*, 55 *N. Y. R.* 452) we corrected the judgment by adding to it the amount the plaintiff ought to have recovered. As there is sufficient data before us, we shall do the same in this case.

The plaintiff should have judgment for the additional sum of one thousand four hundred and sixty-one dollars and eighty cents, as of the date of the present judgment, and the judgment should be amended accordingly, together with the costs of the appeal.

CURTIS, J., concurred.

ISAAC L. MILLER, RECEIVER & CO., PLAINTIFF AND
RESPONDENT, v. AMANDA M. HALL, DEFEND-
ANT AND APPELLANT.

CONVEYANCE OF PROPERTY IN FRAUD OF CREDITORS.

PARTIES TO ACTION.

In an action to recover property alleged to have been conveyed by a party with intent to delay and defraud her creditors, the party who conveyed the same is a necessary party defendant in the action, as well as the person claiming to own the same under and by virtue of such conveyance. The cases adjudged before and since the adoption of the *Code* fully reviewed in the opinion of the court.

The case of *Fox v. Moyer*, 54 *N. Y.* 125, reviewed in regard to its bearings upon this and other like cases.

In an action in the nature of a creditor's bill to reach a chose in action, which could not be reached at law, especially where the interest to be reached is a chattel interest, the judgment debtor is a necessary party to said action.

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Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Appeal from a judgment.

The action was to reach the proceeds of a mortgage on real property.

The complaint alleged the recovery of a judgment against one Amanda M. Senior, the mother of the defendant; the issuing and return of an execution unsatisfied; and the appointment of the plaintiff as receiver of the judgment debtor.

It is then alleged that prior to the recovery of the judgment the said Amanda M. Senior owned and possessed a certain bond and a mortgage for ten thousand dollars on real estate in New York, which, without consideration, she had assigned and transferred to Amanda M. Hall, her daughter, the defendant in this action. That said Amanda M. Senior was largely indebted at the time of the transfer, to an extent she was unable to pay, and that by said transfer she had hindered and delayed the collection of her debts.

The relief demanded was an accounting by the defendant for said mortgage; payment of its value; and that the judgment of the plaintiff be adjudged an equitable lien upon the real estate acquired by the defendant under said mortgage.

The answer denied the ownership of the mortgage by Amanda M. Senior in her own right, and alleged that one Edward H. Senior, by his will, had appointed her executrix thereof, and that the mortgage was received by her, as such executrix, in part payment for assets sold and money loaned of said estate; and that individually she never had any interest in the mortgage. She alleged the foreclosure of a prior mortgage, a sale under it, and a purchase by the defendant, and claimed thereunder a title discharged of the incum-

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brance of the assigned mortgage. The answer also alleged a defect of parties defendant, and that Amanda M. Senior was a proper and necessary party.

The action was tried without a jury.

It was objected at the opening of the trial that Amanda M. Senior was a necessary party, and a motion on that ground was made to dismiss the complaint. The objection was overruled and the motion denied. The defendant excepted.

The plaintiff put in evidence the bond and mortgage mentioned in the complaint. It was executed by Alfred H. Senior, Edward M. Senior, and Charles A. Senior, of the first part, and Amanda M. Senior of the second part, dated August 3, 1870, to secure the payment of ten thousand dollars.

The bond and mortgage purported to be to Mrs. Senior personally, and not to her as executrix.

The defendant gave in evidence the will of Edward H. Senior, which contains the following provision: "I will, bequeath and devise all my worldly estate of whatever kind or nature, real, personal, and mixed, unto my dearly beloved wife, Amanda Melvina Senior, for and during her natural life;" and after her death the said estate to be equally divided between his children.

A further provision was as follows: "And it is my will that my business shall continue to be conducted as it is now conducted, so long as my dear wife shall elect to have it so conducted."

The will appointed his wife executrix, and gave her power to sell any and all of the real or personal estate.

Mrs. Senior qualified as executrix. She was examined as a witness, and testified that the mortgagors in the mortgage to her were her sons, and the mortgage was upon a stable which they had built. That at the time the mortgage was given, her sons owed her eight thousand dollars in notes, then held by her,

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which had been given for her husband's business, that of an undertaker. That she had sold to them "coffins, carriages, horses, wagons, and sundry things in the store that carried on the business of an undertaker." That the sale was for twenty-one thousand dollars. When the eight thousand dollars became due they wanted her to take a mortgage on the stable. She had loaned them besides two thousand dollars. She said the eight thousand dollars was the estate's, and the two thousand dollars loaned was her husband's property. She couldn't tell what it came from, but it was collected in after his death. She further testified that she assigned the mortgage that her daughter might get a loan upon it to protect it against a prior mortgage. That her daughter raised money upon it and bought the property at the sale under the foreclosure of the first mortgage. She testified she had no property of her own.

Upon her cross-examination she said she could not specify any debts due to her husband; that she had received the income of the whole of her husband's estate.

The court found the following facts: That the mortgage was owned by Amanda M. Senior, and was assigned by her to the defendant without consideration.

That the premises covered by the mortgage had been sold under a prior mortgage to the defendant, and the surplus arising from the sale distributed to the second mortgage. That the defendant had assigned the said second mortgage to one Hathaway, to prevent its merging in the fee, should she purchase the property at the foreclosure sale of the first mortgage, and also to secure to Hathaway the payment of such sums as he should advance to enable her to purchase at such sale.

As a conclusion of law, it was adjudged that the

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assignment of the mortgage to the defendant was void as to the creditors of said Amanda M. Senior. That the defendant should account for the amount realized by her therefrom. That the plaintiff should recover of the defendant the amount of his judgment.

The defendant excepted to the several findings of fact and law, and requested the judge to find that the mortgage belonged to the estate of Edward H. Senior. That Amanda M. Senior had no personal interest in it except as executrix. That the eight thousand dollars of notes and the two thousand dollars loaned, which formed the consideration of the mortgage, was the property of the estate of Edward H. Senior. That the defendant held the mortgage in trust for the said estate; and that the proceeds thereof were also so held.

The judge refused each and all of such requests and the defendant excepted.

Judgment in accordance with the decision was entered, and the defendant appealed.

T. H. Barousky for appellant, *I. T. Williams* of counsel.

W. W. Badger for respondent.

BY THE COURT.—MONELL, Ch. J.—An examination of the question involved in the motion to dismiss the complaint, has satisfied me that Mrs. Senior is a necessary and proper party to the action.

The object of the action is to reach the proceeds of the assigned mortgage in the hands of the defendant, and is in the nature of a creditors' bill to compel a discovery of property belonging to the judgment debtor or held in trust for her.

Under the law as it existed before the Code, in an action of this kind, the judgment debtor was a necessary party (2 R. S. 173, § 38; *Edmeston v. Lyde*, 1

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Paige, 637; *Boyd v. Hoyt*, 5 *Id.* 65; *Fellows v. Fellows*, 4 *Cow.* 682; *Green v. Hicks*, 1 *Barb. Ch. R.* 309; 2 *Barb. Ch. Pr.* 155).

Since, and under the Code, there is not a complete uniformity of decision on the subject. But the conceded assimilation of the system of practice and pleading under the Code, to the system which prevailed in the late court of chancery, has necessarily, and very properly, given to the decisions of that court great weight in the construction of the present system.

The plaintiff must now, with one or two exceptions, be the real party in interest, and the defendant, such person as has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved.

No change in the law has been made, as to who are necessary or proper parties defendant; and the law on that subject as it existed in the court of chancery, has in several cases been fully recognized and applied to the forms of actions under the Code.

In *Wallace v. Eaton* (5 *How. Pr.* 99) the action was by a judgment creditor to reach property fraudulently assigned to a creditor, and also to avoid a general assignment. The assignor was not a party, and the defendants demurred. The court, after a full examination, sustained the demurrer, but intimated the opinion that had the action sought no other relief than to have the individual transfer declared fraudulent, it *might* have been granted, without the necessity of bringing in the assignor.

In *Shaver v. Brainard* (29 *Barb.* 25), the action was by a *receiver* to set aside as fraudulent a conveyance of real estate, and to apply the proceeds upon the plaintiff's judgment. The grantor and judgment-debtor was not made a party to the action; and the judgment was reversed on that ground.

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In *Vanderpoel v. Van Valkenburgh* (6 *N. Y. R.* 190), judgment creditors sought to reach certain equitable interests of their debtor, in a bond and mortgage executed to the defendant, under the will of the debtor's mother, and which will was claimed to be void, and the court held that the debtor was a necessary party.

The case of *Lawrence v. Bank of the Republic* (35 *N. Y. R.* 320) is directly in point. The plaintiff, as the assignee of Lanes, Boice & Co., had deposited the trust funds in the defendant's bank. The bank refused to pay over the funds, claiming that they were judgment creditors of Lanes, Boice & Co., and that the assignment to the plaintiff was fraudulent and void as to the assignor's creditors. In an action to recover the deposit, the bank set up its claim to apply it to their judgment on the ground stated. After disposing of other questions, the court say: "I am also of the opinion that the proper parties are not before the court to litigate the question. In a creditor's suit against a judgment debtor, to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, he is a necessary party. Indeed, he must be deemed the principal party. . . . The common point of litigation is the alleged fraudulent transfer of the property."

In *Beardsley Scythe Co. v. Foster* (36 *N. Y. R.* 561), one Osborn made a bill of sale of his property to the defendant, which the plaintiffs, judgment creditors of Osborn, sought to have declared fraudulent and void as to his creditors. The court, per BOCKES, J. (p. 556), say: "And again, as an action to reach property fraudulently disposed of by Osborn, he was a necessary party, in the absence of all excuse for the omission," citing *Lawrence v. Bank of the Republic*, *supra*.

The decisions to which I have referred are sufficient to dispose of the question, if they are not disturbed by the recent case of *Fox v. Meyer*, in the commission of

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appeals (54 N. Y. R. 125). That was an action to remove a fraudulent conveyance of real estate, as a cloud on the title, and was brought against the grantee only. The objection of a defect of parties was not taken by demurrer or answer, nor was it raised at the trial. It was stated for the first time in the appellate court, and might have been wholly disposed of there—as it was in effect—under section 148 of the Code, and without any examination of the question.

If, therefore, it shall be found that *Fox v. Meyer* is an opposing authority to *Lawrence v. Bank of the Republic*, and *Beardsley Scythe Co. v. Foster*, it may, upon the point under review, and should be, considered as *obiter*. But Commissioner EARL says, in the opinion, that the grantor was not a necessary party; that the plaintiff claimed that his judgment was a *lien* upon the real estate which had been fraudulently conveyed to the defendant; that he commenced the action to have the *cloud* resting upon the lien of his judgment removed, and his judgment satisfied out of the land, notwithstanding the conveyance. And the learned Commissioner says, the conveyance being good, as between the parties, no one had any interest to defend the suit but the defendant, and he was, therefore, the only proper party defendant. But that action was not a creditor's bill (as the court admitted), the object of which is to reach choses in action, and equitable assets of the judgment debtor, which can not be reached by execution. In such an action, the Commissioner says, the judgment debtor *is* a necessary party. But that was an action to have a conveyance declared fraudulent and void as to the plaintiff's judgment, in which action it had sometimes been held, he says, that the *lien of the judgment* alone gave the plaintiff his standing in a court of equity. The learned commissioner does not refer to the cases of *Lawrence v. Bank of the Republic*, and *Beardsley Scythe Co. v. Foster* (*supra*), probably for the reason

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that these actions related to personal property, and were in the nature of creditor's bills.

The action in the case before us is a creditor's bill to reach a chose in action, which could not be reached at law. The bond and mortgage were personal assets, and the nature of the property has not been changed by a foreclosure sale of the mortgaged premises. The interest to be reached remains a chattel interest, and is the subject of a creditor's bill, to which, under all the cases, the judgment debtor is a necessary party.

Here the objection was taken by answer and at the trial, and the court ought to have ordered the debtor to be brought in as a party defendant.

There are reasons disclosed by the evidence in this case why Mrs. Senior ought to have the right of being heard. She claims that the mortgage was the property of her husband's estate, was taken by her for its benefit, and assigned in the same interest. And the defendant asserts that she purchased and now holds the mortgaged lands in trust.

It is not enough that the assignor of the bond and mortgage was allowed to testify, and that the facts have been found against her evidence. Not being a party, she must submit, without the power or right of appeal.

I do not suppose there is any collusion between the parties to the action, but the suggestion illustrates the propriety of giving Mrs. Senior an opportunity to protect, under the forms of law, the estate of which she claims to be the legal representative, against her individual creditors.

The view we have taken of this question renders it unnecessary to examine any of the other questions in the case.

To enable the plaintiff to bring the judgment debtor into the action as a party defendant, the judgment appealed from must be reversed, and with costs to the

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appellant to abide the event; and a new trial must be granted, before which is had, the judgment debtor may be brought in, on such terms as may be just.

CURTIS, J., concurred.

**AARON HERZBERG AND ANOTHER, PLAINTIFFS
AND RESPONDENTS, v. HENRY MURRAY, DE-
FENDANT AND APPELLANT.**

VERDICT OF A JURY.

**AMENDMENT OF, EFFECT OF IRREGULARITY OF SAME, WHEN NOT
AMENDED.**

In the case at bar, the action was to recover from defendant, upon an agreement to pay to the plaintiffs one half of all losses sustained by them in consequence of the bad debts arising from any and all sales made by or through one Bannon, a salesman; and a schedule or list of the debts claimed by them to be bad, were attached to the complaint. The jury found a sealed written verdict for plaintiffs for eight hundred and thirty-seven dollars and added, *the judgment and debts mentioned in the schedule, viz., sixteen hundred and seventy-four dollars, to be assigned to the defendant for his benefit.*

HELD

That such a verdict was void. It was not such a verdict as could properly have been found under the issues submitted to the jury. They could only find for the plaintiffs, assessing the damages, or generally for the defendant.

The award of the bad debts, which formed the subject matter of the action, was not within the province of the jury.

The jury should have been required to correct it. The court could not do it for them.

Upon the reception of a sealed verdict which is imperfect in substance or form, the court may cause the jury to retire and correct it. After it is received and recorded it can not be altered.

If the alteration, however, is merely as to the form of the

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verdict, and not affecting its substance, it would not be cause for setting it aside (*Sayre v. Jewett*, 12 *Wend.* 135; *Burhans v. Tibbitts*, 7 *How. Pr. R.* 21.)

In the case at bar, the court held that this verdict could not be amended or altered by the court, by striking out the portion relating to the assignment of the bad debts, as thereby it would no longer be the verdict returned. Such an amendment was one affecting its substance, and could not be made by the court.

Before MONELL, Ch. J., and CURTIS, J.

Decided Jan. 8, 1876.

Appeal from an order denying a motion to vacate the judgment and to grant a new trial.

The action was against the defendant as surety upon an agreement between the plaintiffs and one Bannon, wherein the plaintiffs agreed to employ said Bannon as salesman, and the defendant agreed that he would pay to the plaintiffs all losses by them sustained in consequence of the non-payment to them of all moneys collected by said Bannon; and also one half of any and all losses sustained by the plaintiffs in consequence of the bad debts arising from any and all sales made by or through said Bannon.

The complaint alleged the collection of money by Bannon, which he failed to pay to the plaintiffs; and also losses sustained by them in bad debts arising from sales made by Bannon.

Annexed and referred to in the complaint was a schedule of the bad debts claimed as losses by the plaintiffs, upon sales made by Bannon, consisting of thirty-two debts, aggregating and amounting to one thousand six hundred and seventy-three dollars and three cents.

At the trial, the court left it for the jury to determine what amount Bannon had collected, and failed

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to pay over, and also the amount of bad debts he had made upon sales of the plaintiffs' property. And instructed the jury that for the amount of moneys collected and not paid over, and the one half of the bad debts the plaintiffs were entitled to recover.

The jury were directed to sign and seal their verdict, and deliver it to the court on the day succeeding the trial.

The following is the written verdict of the jury, handed to the court, and signed by all the jurors, they having separated after the agreement: "The jury say that they find a verdict for plaintiffs for eight hundred and thirty-seven dollars; the judgment and debts mentioned in the schedule, viz., sixteen hundred and seventy four dollars, to be assigned to the defendant for his benefit."

The amount found for the plaintiffs is just one-half of the bad debts mentioned in the schedule annexed to the complaint.

Upon the rendition of the verdict, the defendant moved to set aside the verdict, for irregularity. At the same time the plaintiffs moved to amend the verdict. The court held the motions under advisement, and finally denied the motion to set aside the verdict, and granted the motion to amend, and accordingly directed the clerk to amend the verdict by striking out the words "the judgment and debts mentioned in the schedule, viz., sixteen hundred and seventy four dollars, to be assigned to the defendant for his benefit."

Judgment for the amount found for the plaintiffs, and the taxed costs, was afterwards entered.

The defendant moved at Special Term to be relieved from the judgment, and to vacate and set it aside, and for a new trial. The motion was founded upon a case made and settled containing the foregoing facts, and also upon affidavits of all the jurors, that after they retired there was a great difference of opinion among

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them in respect to the case, and that they would not have agreed, if the condition that the alleged bad debts should be assigned to the defendant, as stated in the verdict, had not been a part thereof.

The defendant's motion was denied, and he appealed from the order.

N. J. Waterbury for appellant.

Mr. Yeaman for respondent.

BY THE COURT.—MONELL, Ch. J.—The objection of the respondent's counsel, that the questions involved in the case are not before the court in a form entitling them to be considered, is not free from difficulty.

A motion for a new trial was made upon, as it is alleged, the judge's minutes. That is one of the prescribed forms for obtaining a review of the trial. It can be made upon exceptions, or for insufficient evidence, or for excessive damages. An appeal from an order denying the motion puts the general term in possession of the case.

We have lately held (*Gregg v. Howe*, 37 *Sup'r. Ct.* 420; *McMicken v. Lawrence*, 39 *Id.* 540), that an *exception* to a denial of a motion for a new trial is unavailable in the general term.

The motion for a new trial upon the minutes of the court, is in lieu of a motion at the special term, and an appeal from the order may be taken directly to the general term.

A party can not do both. If he moves upon the judge's minutes, he can not afterwards move at the special term upon a case.

If, therefore, it had appeared in this case that the motion at the trial was made upon the judges minutes, we should be compelled, I think, to dismiss the appeal, on the ground, that the motion at special term, could not afterwards properly be made.

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But I do not find in the *case* any statement that the motion at the trial was made upon the judge's minutes. The order entered upon the motion recites it as "defendant's motion to set aside the verdict *as irregular*, and the plaintiff's motion to amend the verdict" being heard, &c., and it does not state upon what the motions were founded; probably it was upon the verdict in the form in which it was rendered.

When the motion was made at special term, then it appeared for the first time, and only in the affidavits used on that motion, that the defendant's application at the trial was made upon the judge's minutes.

But as the mode of presenting the question to the general term is defective, at most, only in form, I think, in view of the importance of those questions, any such defect should be overlooked.

The verdict as rendered by the jury was not such a verdict as could properly have been found under the issues submitted to the jury. They could only find for the plaintiff assessing the damages, or generally for the defendant. The award of the bad debts, which formed the subject of the action to the defendant, was not within the province of the jury.

Upon receiving a sealed verdict which is imperfect in form or substance, the court may cause the jury to retire and correct it. But, it seems, if the verdict is received and recorded, it can not be afterwards altered (3 *Gra. on new trial*, 1405). If the alteration is merely of the form of the verdict, not affecting its substance, it would not be cause for setting the verdict aside (*Sayre v. Jewett*, 12 *Wend.* 135; *Burhans v. Tibbits*, 7 *How. Pr. R.* 21).

In the case before us the verdict was received and recorded. It was *afterwards* amended by striking out a part of it. If that could be done, it must be on the ground that the part stricken out was wholly immaterial, and did not affect the verdict as a whole.

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But the jury seem to have attempted to make an equitable disposition of the case. They appear to have thought that as the defendant was to be held liable for the bad debts, he was entitled to have them assigned to him for what they were worth. There was not, however, any such relief demanded by the defendant, and the award of the debts to him was unauthorized, and, in my judgment, rendered the whole verdict void.

Under these circumstances, it was the duty of the court to have refused to receive the verdict, and sent the jury back with instructions to find an unconditional verdict.

The verdict as rendered was not such a verdict as the court could, under the pleadings and issues, render a judgment upon; and hence, when it was altered to conform to such issues, it no longer was the verdict which the jury had returned.

And it was too late, after it had been recorded, to make the alteration, as has already been said. And see *Warner v. New York Central R. R. Co.*, 52 N. Y. 437.

I have not regarded the affidavits of the jurors, read upon the motion below. Such affidavits can not, as a general rule, be received to affect their verdict, and are not necessary in this case. It is enough, however, that the verdict they returned was void. *They* should have been required to correct it, the *court* could not do it for them.

The order should be reversed, the judgment should be set aside, and a new trial granted, with costs to the appellant to abide the event.

CURTIS, J., concurred.

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GUSTAVUS ISAACS, PLAINTIFF AND APPELLANT
v. THE NEW YORK PLASTER WORKS,
DEFENDANT AND RESPONDENT.

APPEAL.

Objections not taken at the trial, which might have been lessened or destroyed by evidence, can not be taken for the first time on the hearing of the appeal.

CONTRACT FOR DELIVERY DURING THE SEASON.

In the case at bar, the defendants were to deliver during all the season, which gave them until the first of January to complete the delivery.

As a necessary preliminary to this action, the plaintiff should at the close of the season have made his demand for the delivery, and should have proved defendant's refusal to deliver on the trial (*Newton v. Wales*, 8 *Robt.* 453).

Proof of readiness to receive and ability to pay is essential where the time and place of the delivery has not been fixed by the contract and where the place is to be designated by the party who is to receive the same.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 2, 1876.

Appeal from a judgment.

The action was to recover damages for the non-delivery of a quantity of plaster stone.

The complaint alleged a contract for the sale by the defendant, and purchase by the plaintiff, of three thousand tons of plaster stone, part of which was delivered and paid for, and a part was refused delivery.

There was a general denial by defendant.

The contract was by parol, and was proved by the following evidence. The plaintiff testified as follows :

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I know the defendant. In June, 1872, I met Mr. Bonnevillle, who represented himself as an officer of the New York Plaster Works, and had conversations with him in regard to the purchase of a quantity of plaster stone from their quarries in Nova Scotia. Mr. Bonnevillle told me the company had a quantity of plaster stone for sale, and that his company was mining a quantity of stone in Nova Scotia, and would have some for sale, and asked me if I wanted to purchase any. I told him yes, I was ready to purchase stone. We talked over the quantity and quality of this stone. He asked how much stone I would take that season; I told him I was ready to contract for about three thousand tons. He said he was ready to contract to supply that amount from the mines of the company in Nova Scotia, and mentioned the quarries from which the stone would come as the Hunter Quarry and the Burgess Quarry. He stated that the stone would be superior to any thing that had been yet brought from Nova Scotia; that they had the best quarries down there. I told him if he would furnish me with three thousand tons of stone that was equal to that I was in the habit of receiving, I would be perfectly satisfied; that the stone I was in the habit of receiving was known as Wentworth Creek stone;—if he would furnish me stone equal to the Wentworth Creek stone, I was perfectly satisfied with it.

After stating the price agreed upon, the witness proceeded. He spoke of chartering vessels down there at the quarries, or chartering them here in New York. On the arrival of the stone they were to notify me, and I was to let them know whether the cargo should be delivered at the dock in Williamsburg, or the dock in New York. A cargo of stone arrived in the "Addie M. Bird," about September 1st, and I received the bill of lading for four hundred and thirty tons. The stone proving not to be such as I contracted for, I declined

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receiving it, on account of its being inferior stone. I afterwards took at a reduced price. Towards the end of October, a cargo came by the "Souvenir," and I received the bill of lading for three hundred tons, which I received and paid for. At the time of paying for the last cargo, I was told that the defendant had chartered a vessel which would bring another cargo, and they would bring on stone as fast as they could; that they had chartered a vessel named "Kedron," and would let me know as soon as they heard of a shipment and arrival of the stone, and I was to let them know where to deliver it. The "Kedron" arrived with a cargo of stone in December. I went to the defendants' office and gave direction where to deliver the cargo, and told them to deliver it at once according to the contract, at the foot of Bethune Street, where I was ready to discharge and pay for the cargo immediately on its being discharged. They never delivered the stone from the "Kedron." Two or three days afterwards I saw of the arrival of the "Billy Simpson" with four hundred and forty tons of plaster, and I went to the defendants, and demanded the cargo under the contract, and to send it to the foot of Bethune Street. I never received it. Upon his cross-examination he said, the defendants agreed to ship the plaster as fast as they could get vessels at a reasonable rate. They were to ship it just as soon as they could get a vessel, and it was to be delivered in all that season. The season ran generally up to about the first of January; sometimes up to the middle of January, until navigation is closed in Nova Scotia.

No subsequent demand was proved, nor was there any evidence of the ability of the plaintiff to pay.

At the close of the plaintiff's evidence, the court stated that the plaintiff could not recover in any aspect of the case, on the contract as alleged in the pleading, and upon the testimony given. That no demand and tender after the close of the season was alleged or

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proved; that plaintiff, after the close of the season, should have demanded of the defendants the delivery of the remainder of the three thousand tons, and tendered to, or offered to pay the balance due under the contract, and further, that plaintiff had not shown any right to these particular cargoes of the "Kedron" and "Billy Simpson," for the non-delivery of which plaintiff had sued.

The plaintiff's counsel asked to go to the jury upon the question of the making of the contract, the arrival of the stone consigned to the defendant, deliverable under that contract, and the demand upon the defendants in season after the arrival. Upon the question as to whether there was a demand upon the defendant to deliver the stone arriving by the "Kedron" and "Billy Simpson," whether, at the time those vessels arrived, the stone aboard belonged to the defendants, whether those cargoes were the subject of contract by any other person at the time of their arrival or before, and whether the defendants, themselves took and appropriated to their use as distinguished from a delivery under any other contract, the two cargoes of stone by the "Kedron" and "Billy Simpson."

The request was denied, and the plaintiff excepted.

The plaintiff offered to prove, that between the date of the agreement and the first day of January, 1873, no notice of the arrival of any other cargoes than those described by the witness, was given by the defendants to the plaintiff, and no opportunity was offered by them to receive any other stone during the balance of the season.

The court ordered the complaint to be dismissed; the plaintiff excepted, and appealed from the judgment.

G. A. Seixas for appellant.

F. E. Dana for respondent.

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BY THE COURT.—MONELL, Ch. J.—Several of the objections urged by the respondent's counsel, upon the argument of the appeal, do not appear to have been taken at the trial, and as their force might have been lessened or destroyed by evidence, they can not now for the first time be raised.

These objections relate to the validity of the contracts, one of which, that the contract is void under the Statute of Frauds, I will notice.

The contract was for three thousand tons of plaster, not in bulk, or in a single cargo, but to be delivered in all the season running from the date of the contract, to the first or middle of the subsequent January. The contract was therefore divisible, and not only capable of a separate delivery, but a separate delivery was contemplated and intended by both parties.

A portion of the stone, three hundred tons, by the "Souvenir," was delivered, "*accepted and received*," under the contract, which brings it within the exception in the statute (*Flanagan v. Demarest*, 3 Robt. 173; *Caulkins v. Hellman*, 48 N. Y. 449; *Talmage v. White*, 35 Sup'r. Ct. 220).

The ground upon which the complaint was dismissed, was, that no sufficient demand and tender of performance by the plaintiff was shown, and the learned judge held, that such a demand and refusal should have been made at or after the close of the season. In that we think he was right. The vendors, the defendants, under the contract, were to deliver the stone in all the season, which gave them until the first or middle of January to complete the delivery.

The plaintiff seems to have regarded the contract as giving him an absolute right to the cargoes, per the "Kedron" and "Billy Simpson," and has rested his claim to recover upon the defendants' neglect or refusal to make delivery of those cargoes. But there is nothing in the contract upon which any such claim can be pre-

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licated. The promise to ship the stone as fast as the defendants could procure vessels, and that they had chartered the "Kedron," and would inform the plaintiff of her arrival, did not in fact or effect transfer the cargo of that vessel to the plaintiff, nor give him the right to demand its delivery under the contract. It did not impair or lessen the time of performance, and the refusal or neglect to deliver those cargoes did not operate as a rescission of the contract by the defendant. They had still the right to go on, and from time to time, by any vessels or other vessels, make delivery down to the close of the season. And a tender from any of such other vessels, if made within the time limited for the delivery, would have been a sufficient compliance with the contract on the defendants' part; and a refusal to accept such tender would have put the plaintiff in default.

Besides, if the refusal to deliver such cargo could work a rescission by the defendants, it at most would have subjected the defendants to damages for injuriously delaying the delivery. But it did not lay the foundation for damages for a non-delivery of the remaining quantity. The right to deliver during the season continued, and the defendants could not be put in default until the end of it; and then, as a necessary preliminary to his action, the plaintiff should have made his demand, and shown the defendants' refusal (*Newton v. Wales*, 3 *Robt.* 453).

Another ground for the nonsuit, was that the plaintiff had not shown that he was ready and willing to receive and pay on delivery.

Such a readiness to receive, and ability to pay, might, and under some contracts will remove the necessity for a demand. That is especially so when the time and place of delivery is fixed by the contract (*Mount v. Lyon*, 49 *N. Y.* 552). But the rule can not apply where the contract requires the delivery to be at a place

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to be designated by the vendee. Certainly not until the place has been designated.

In respect to the cargo by the "Kedron," the place for its delivery was designated, the plaintiff testifying that he *would* be at the place ready to discharge and pay for the cargo immediately on its being discharged. He did not, however, testify to any refusal, only to a neglect to deliver, and he did not say that he was afterwards at the place, ready and willing to receive and pay for the cargo.

But even if the plaintiff had brought himself within the rule, it would have applied only to the cargo of the "Kedron," and, if otherwise entitled to recover for the non-delivery of that cargo, it would still have left his cause of action incomplete for the remainder of the contract, and proof of readiness to receive and ability to pay as to such residue would have been essential.

It seems to be now well settled, that in an executory contract for the sale, and a future delivery of personal property, where the time and place of delivery are fixed, or are capable of being fixed, the vendee, to put the seller in default, must be ready and willing at the time and place, to receive and pay (*Mount v. Lyon, supra*, and cases there cited). As the court say in that case, it is not necessary that he should keep on hand during the whole time of the contract a sum of money sufficient to pay for the whole quantity. "It is sufficient that he had the means at his command which would have enabled him to pay."

It is, therefore clear, even in respect to any right of action for the non-delivery of the "Kedron's" cargo, that the plaintiff failed to show the necessary facts to bring his case within the rule.

He did not show that he was at the designated place of delivery with the means to pay for the cargo.

Upon both grounds, therefore, the decision was correct.

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The judgment should be affirmed.

CURTIS, J., concurred.

ELIZABETH A. FURMAN, PLAINTIFF AND RESPONDENT, v. GEORGE G. TITUS, DEFENDANT AND APPELLANT.

FRAUDULENT REPRESENTATIONS.

To maintain an action for fraud and deceit, based upon fraudulent representations, the representations must not only be false, but the party making them must believe, or have reason to believe, them false; and such representations must influence the other party to the contract.

A representation of the value of property, although untrue, will not authorize a recovery, where the vendee has an opportunity to examine the property and judge of its value. Such a representation is the expression of an opinion, the correctness of which the vendee is supposed to be as competent to judge of as the party making the same, and an action for a deceit in mistating the value can not be maintained (*Ellis v. Andrews*, 56 N. Y. 83).

Before MONELL, Ch. J., and CURTIS, J.

Appeal from a judgment.

Decided January 8, 1876.

The action was to recover damages for a false representation.

The defendant contracted to sell to the plaintiff a certain lease of premises in this city, and as it was alleged in the complaint, with intent to deceive and

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defraud the plaintiff, fraudulently and falsely representing to her: 1st. That the said lease was a valuable one. 2nd. That it was worth eight thousand dollars bonus. 3rd. That the fixtures, repairs, &c., placed by him therein were worth four thousand dollars to the lessee. 4th. That there were no expenses whatever to be made or paid by the lessee, except the rent and cleaning, and that there were no deductions from the rent agreed to be paid by each tenant. 5th. That the sub-tenants were prompt to pay, and responsible. 6th. The rent agreed to be paid by the tenant in several instances. 7th. That the premises were in perfect repair. 8th. That the profit thereon to the lessee had been, and would continue to be, from nine hundred to one thousand dollars per year. 9th. That he owed nothing on said lease.

That relying upon such representations, and believing them to be true, the plaintiff conveyed certain other property to the defendant as a consideration for said lease, and received an assignment thereof.

That the representations were and each of them was false and was so known to be by the defendant.

The action was tried by a jury.

The court, in submitting the case, charged the jury as follows: After disposing of the first and second representation, with saying that they did not constitute a fraud, unless made under circumstances which were calculated to mislead the party, he said: "3rd. That the fixtures placed there by him were worth four thousand dollars to the lessee. Now, as to that, he had no business, if that is found not to be true, to make that statement, if he put those fixtures there, and they did not cost that much, and very much less. Defendant's statement here was, he paid two thousand five hundred dollars for the cost. He represented the value at four thousand dollars, and if he knew the cost, and represented the value to be nearly one-half more, that

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is false. The next representation is, that there were no expenses whatever to be met or paid by the lessee except the rent and cleaning, and that there were no deductions from the rents agreed to be paid by each tenant. I have to say to you, if that is not so, it is a false representation. These tenants were there, they were paying money, and if he chose to make a representation, he is bound by what he says; if it turned out that these tenants were not paying the amounts named, why, being false, it is a fraudulent representation. That the sub-tenants were prompt to pay, and responsible. As to that, of itself, it is not a fraud. A man may make one statement in regard to that, and another may make another. How responsible, or how prompt, is a question for business men to determine. The sixth representation is, that the rent paid by the tenants accrued instant—*instant*—that is accrued whenever the time expired that it should be paid. That the premises were in perfect repair. Now, as to the repair of these premises, if this plaintiff went there and looked at these premises herself (and it is very evident she did, because she admits that she did), it can not be said to be a fraud, because every man is bound to use his eyes, and exercise his judgment, and to judge of such matters himself. That is, always on the supposition, however, that there is nothing done to mislead him. That the profits to the lessee had been, and would continue to be, from nine hundred to one thousand dollars a year. Well, now, as to that, if there were no such profits, then when he made that statement it was a false representation. Ninth, that he owed nothing on said lease. That is not involved in the action."

The court then generally charged, that the real point was, whether the defendant had made a false statement in the matter relating to the value of the lease, its terms, and the condition of the building.

The defendant's counsel requested the court to

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charge: That to maintain an action for fraud and deceit based upon fraudulent representations, the representations must not only be false, but the party making them must believe, or have reason to believe, them false, and such representations must influence the other party to the contract. Which was refused, the court saying he had so charged substantially.

The defendant excepted to the charge, and refused.

The verdict was general for the plaintiff.

The defendants appealed.

F. G. Salmon for appellant.

D. C. Calvin for respondent.

BY THE COURT.—MONELL, Ch. J.—I am of the opinion that so much of the charge of the learned judge as held that a representation of the value of the fixtures and repairs placed upon the leasehold premises, would, if found to be untrue, authorize a recovery, was erroneous.

Such a representation is the mere expression of an opinion, the correctness of which the vendee is supposed to be as competent to judge of, as the party making it. When the purchaser has the opportunity, as she had in this case, to personally examine and judge for herself, an action for a deceit in mis-stating the value, can not be maintained (*Ellis v. Andrews*, 56 N. Y. 83).

There were other parts of the charge which related to representations, which, if untrue, were such as an action could be maintained on them, and they were to some extent separated from those which did not fall within the rule. But the part especially excepted to, was presented to the jury in such a manner, as to leave them at liberty to find their verdict upon it alone. They were told, in effect, that if the defendant untruly

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represented the value of the fixtures, he had no right to do so; that if he put the fixtures there, and they did not cost that much, and very much less, he had no right to make the statement. He represented the value at four thousand dollars, and if he knew the cost, and represented the value to be nearly one-half more, that is false. "Again," he said, "a false, deliberate statement of any fact or facts, made with knowledge and intent to deceive, and material to the subject, is a false representation." And he concluded that part of the charge by saying, "Whenever the defendant has represented anything in relation to the value of this property which was false upon its face, and which he knew to be false, and which the party inquiring of him had not the means of ascertaining, that is clearly a fraudulent representation, and he must be responsible for it."

There was nothing in the subsequent portions of the charge, which corrected the error in respect to the representation of value, and the jury, if they found that representation untrue, were authorized to give the plaintiff a verdict.

It is not enough that there were other representations sufficient in substance, and sustained as to their falsity by the evidence, and upon which the jury have found favorably to the plaintiff. The verdict is general, and it is not possible to say which of the representations was found by the jury. It is as proper to presume the one as the other, and it may have been the one erroneously given to the jury by the court, as being sufficient in substance to sustain the action.

I am also of the opinion that the request to charge was correct. It contained an important element of a fraudulent representation, namely, that the other party was influenced by it (*Taylor v. Guest*, 58 *N. Y.* 262).

The request was refused, not that it was not a cor-

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rect proposition of law, but under the belief that the court had so already charged. But I am unable to find anywhere in the charge the statement that to constitute a representation fraudulent, it must have influenced the party to whom it was made. The charge is wholly silent on that subject, and for that reason the defendant had a right to have the jury instructed in the language of the request.

The judgment should be reversed, and a new trial granted with costs to the appellant to abide the event.

CURTIS, J., concurred.

IGNACIO F. ALFARO, PLAINTIFF, v. STRAT-
FORD P. DAVIDSON, DEFENDANT.

APPEAL TO THE COURT OF APPEALS.

Motion for order under ch. 322, Laws of 1874.

Held, that the questions involved in the judgment in this action are not such as require the court to certify the case to the court of appeals. None of them bring the case within the rule laid down in *Butterfield v. Radde* (88 *Sup'r. Ct.* 44).

Upon the appeal from the order denying a motion for a new trial upon the minutes, the order was affirmed by this court without examination of the alleged errors, because the grounds of the motion below did not appear in the order or elsewhere in accordance with *Alfaro v. Davidson* (89 *Sup'r. Ct.* 468).

Held, that there being a doubt of the correctness of this last decision, the motion, so far as relates to the order affirming the order denying the motion for a new trial, is granted.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Opinion of the Court, by MONELL, Ch. J.

Motion under chapter 322 of the *Laws of 1874*, for leave to appeal to the court of appeals.

The grounds of the motion appear in the opinion.

S. F. Cowdrey for the motion.

F. R. Coudert opposed.

BY THE COURT.—MONELL, Ch. J.—This action was tried by a jury, and a verdict rendered for the plaintiff.

Upon the rendition of the verdict, the defendant moved the court “upon his notes of the trial, to set aside the verdict, and for a new trial,” which motion was denied.

An entry was afterwards made in the clerk’s minutes as follows: “Motion for a new trial upon the judge’s minutes denied.”

Treating this as an *order*, the defendant appealed to the general term, and procured a stay upon the verdict until the appeal should be heard and decided.

The court, upon the appeal, affirmed the order, whereupon judgment upon the verdict was entered; the defendant appealed therefrom to the general term, where the judgment was affirmed.

The judgment not being for more than five hundred dollars, the defendant, to enable him to appeal from both judgment and order, ask us, under chapter 322 of the *Laws of 1874*, to state in an order “that there is involved some questions of law which ought to be reviewed in the court of appeals.”

The questions disposed of by the court, upon the appeal from the *judgment*, are not such as to require this court to certify the case to the court of appeals. None of them bring the case within the rule laid down by us in *Butterfield v. Radde* (38 *Sup’r. Ct.* 44). The motion, therefore, so far as it relates to the *judgment*, is denied.

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Upon the appeal from the order, the court decided, that where the grounds of the motion below did not appear in the order or elsewhere, the appellate court would affirm the order, without examining the alleged errors of the trial (39 *Sup'r. Ct.* 463).

There is, possibly, sufficient doubt of the correctness of that decision to authorize us to certify that it ought to be reviewed in the court of appeals. So much of the motion, therefore, as relates to the order affirming the order, denying the motion for a new trial, is granted.

CURTIS, J., concurred.

JONAS FISCHER, PLAINTIFF AND RESPONDENT,
v. THE HOPE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, DEFENDANT
AND APPELLANT.

L. RE-INSURANCE.

1. LIABILITY OF RE-INSURING COMPANY TO HOLDERS OF POLICIES
OF THE RE-INSURED COMPANY.

a. *Liable for the amount of premiums paid to the re-insured company, and interest thereon.*

1. Where by the contract, the re-insuring company agrees to re-insure all the outstanding policies of the re-insured company, and to pay to the holders thereof, all such sums as the re-insured company might *by force of such policies* become liable to pay; and the re-insured company agrees to assign all premiums due, and to become due on its policies, and the good-will of its business, to the re-

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insuring company ; and the re-insured company thereupon ceases to transact business ; *a policy holder who has paid all the premiums on his policy which fell due before and at the date of the transaction may, without payment of the premiums thereafter falling due, recover from the re-insuring company the amounts paid by him for premiums, with interest thereon, although he is not a party to the contract of re-insurance.*

1. **DISAFFIRMANCE BY POLICY HOLDER OF THE CONTRACT CREATED BY THE POLICY, WHAT IS NOT.**

1. *The bringing of an action against the re-insured company for the premiums paid and interest thereon, and prosecuting the same to judgment is not.*

II. **RES ADJUDICATA.**

1. *Dismissal of complaint on the merits in an action brought by a judgment creditor against the judgment debtor and a third party, in the nature of a creditor's bill to reach the judgment debtor's assets in the hands of the third party, is not res adjudicata to a claim against such third person, in favor of the party who obtained the judgment, arising out of an agreement between the third party and the judgment debtor, whereby as between themselves the third party answered and agreed to pay the claim upon which the judgment was recovered.*

Before MONELL, CH. J., and CURTIS, J.

Decided January 8, 1876.

Appeal by the defendants from a judgment in plaintiff's favor entered upon the report of a referee.

The plaintiff, on August 28, 1869, insured his life in the Craftsman's Life Assurance Company of New York, for one thousand dollars, taking a ten years' endowment policy, and paid thereon twelve quarterly premiums of twenty-seven dollars and sixty cents each, including that of May 25, 1872, amounting in all to three hundred and thirty-one dollars and twenty cents.

The Craftsman's Company refused to accept the quarterly premium falling due in August, 1872. The plaintiff then ascertained that on May 25, 1872, the Craftsman's Company entered into an agreement with

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the defendants by which the latter for a valuable consideration agreed to re-insure the former on all risks of that company for which policies were then outstanding, and to assure all such policies, and to pay to the holders thereof all such sums as the said Craftsman's Company might by force of such policies become liable to pay, including dividends declared for the year 1872, on premiums not yet due, and also to accept from all holders of policies a surrender of the same, and thereupon to issue to such holders its own policies of like class and like amounts.

The Craftsman's Company, from the date of said agreement, ceased to issue policies or to receive premiums, and each company proceeded to carry into effect such agreement.

The value of the policies existing on May 25, 1872, of the Craftsman's company was fixed. The value of the plaintiff's policy that day was fixed at two hundred and forty-nine dollars and fifty cents between the two companies, including the cost of re-insurance; and the Craftsman's Company placed in the defendant's possession assets of the value of one hundred and fifty-five thousand dollars, and from which the defendants realized afterwards more than one hundred and thirty-five thousand dollars.

The plaintiff commenced an action against the Craftsman's Company, in the court of common pleas, to recover the damages he had suffered by reason of its not fulfilling the agreement contained in the policy of insurance, and recovered a judgment against the company on April 29, 1873, for the sum of five hundred and eighteen dollars and seven cents, and caused execution to be issued to collect the same, which was afterwards returned wholly unsatisfied, and the same remains unpaid.

In October, 1873, the plaintiff brought an action against both the companies to reach the property of

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the Craftsman's Company, and for other relief, which resulted in a dismissal of his complaint upon the merits, and judgment in favor of the defendants.

The plaintiff then commenced the present suit, claiming that the defendants were liable by reason of their contract with the Craftsman's Company. The defendants by answer, insisted, that no such liability arose from the contract, and that in the action last above referred to, the same subject-matter was involved as in this action, and that they recovered judgment therein.

The referee found that the plaintiff was entitled to the amount paid for premiums, with interest.

Samuel A. Noyes, attorney, and of counsel for appellant, urged : I. The plaintiffs' action in bringing his suit against the Craftsmen's Life Assurance Company, is clearly in disaffirmance of his policy or contract of insurance with that company. On the other hand, if the plaintiff had brought an action in affirmance of his policy, its validity, and his rights thereunder, the action would have been for the issue to him of a paid-up policy for as many tenths of one thousand dollars as he had paid years' premiums ; or in default thereof, for the then cash value of such a paid-up policy, under the following clause in his policy : "And the said company do hereby further promise and agree, that if, after premiums upon this policy for not less than two complete years of assurance, have been duly received by this company, this policy should cease in consequence of default in payment of a subsequent premium, this company will, on due surrender of this policy and of the profits thereon, issue in lieu thereof, provided such surrender be made within three months of the date of such default, another policy, payable as herein provided, on which no further premium shall be required, for as many tenth parts of the original amount hereby assured as

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there shall have been complete annual premiums paid."

II. The defendants, The Hope Mutual Life Insurance Company, is in no way obligated or bound to the general creditors of the Craftsmen's Life Assurance Company, but only to policy holders, under a state of facts which bring them strictly under the agreement. The plaintiff, at best, is nothing more than a general creditor of the Craftsmen's Life Assurance Company.

III. The assertion of the plaintiff's counsel, that one of the clauses of the defendants' agreement of May 25, 1872, was intended for those policy holders who would not accept the re-insurance, provided for them in the defendants' company in place of the Craftsmen's Company, is without foundation, and is incorrect. Our answer to this assumption is two-fold: *First*.—The plaintiff is in no situation to take advantage of this position (the correctness of which we deny), for he has repudiated any relation of a policy holder to the Craftsmen's Company. *Second*.—All that the plaintiff could get from the Craftsmen's Company, in case he declined to continue to pay his premiums, was a paid-up policy for as many tenths of one thousand dollars as he had paid annual premiums, provided he surrendered his policy, and made a demand therefor within three months from such default. As the fact is, he made no such demand, and his policy lapsed, became void, and of no effect. The defendants received so much money from the Craftsmen's Life Assurance Company for the re-insurance of its risks (if the policy holders chose to accept the provision thus made for them), and for assuming its liabilities to policy holders, which arose by force of any agreement, covenant, or promise contained in said policy. Such is the full extent of the defendants' agreement, which can not be extended beyond its legitimate construction to suit the plaintiff's fancied claim in this action. Provided the

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Craftsmen's Life Assurance Company refused to carry out their part of the contract, all that the plaintiff could recover from the Craftsmen's Life Assurance Company, in any event, had he brought his action for damages, would be the net reserve value of his policy, or what it would cost to place him in *statu quo* in another responsible life insurance company. This the plaintiff does not claim, nor can such a claim be considered in this action.

IV. The fact that the defendants received a gross sum for the re-insurance of the Craftsmen's Life Assurance Company's policies, places it under no obligation to assume or pay such a claim as the plaintiff makes in this action. The question is not what the defendants have received, but what they have promised agreed to do.

V. A gross sum was received by the defendants from the Craftsmen's Company for the re-insurance of its policies, and for assuming the risk of all the policy holders of said company, demanding such substitution of their policies. Even conceding (which we deny) that such consideration is an apportionable one, it can not be said that the defendants have received the sum at which plaintiff's policy was rated in the schedule without giving any consideration therefor. The defendant in relation to the Craftsmen's policy holders, has assumed the risk of their calling for its policies.

VI. The former action between these parties in this court is *res adjudicata*. Although it was an equity action, the plaintiff could there claim and prove (if he was able) the same relief that he claims here. It matters not whether an action is legal or equitable, a party is entitled to such relief as the facts proved, or such as he might prove, warrant—be that relief legal or equitable (*Armitage v. Pulver*, 37 N. Y. 494).

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D. S. Riddle, attorney, and of counsel for respondent, urged :—I. The agreement of May 25, 1872, went into operation on that day ; is good and valid ; and policy holders may enforce it (*Glen et al v. Hope Mutual Life Ins. Co.*, 56 *N. Y.* 379). The only question that can arise is, whether the plaintiff comes within any of its terms.

II. Every life policy has a value even in the lifetime of the assured (*Ainsworth v. Backus*, supreme court, general term, November, 1875, and reported in *Register* of November 15, 1875 ; also, *Hawkins v. Coutherst*, 5 *Best & Smith*, p. 343). And by turning over to the defendant its assets—especially its securities on deposit with the insurance department at Albany, and which the law requires to be made as a prerequisite to carry on the insurance business (see *Statute* part 1, ch. 18, title 18, article 2, § 68 ; 2 *R. S.* 5th Ed.), the Craftsman's Company disabled itself from carrying out its contract of insurance, and, by actually going out of business, and refusing to carry its policies any longer, it committed a breach of contract with its policy holders, and became liable to pay the damage of such breach, and the measure of such damages would naturally be the sum of premiums paid, with the interest thereon. These liabilities of the Craftsman's Company the Hope Company agreed to pay by the above provision.

III. Plaintiff, by his action in the common pleas, did not disaffirm his policy. If that action had gone on the hypothesis of a disaffirmance of the contract of insurance, then the plaintiff could only have recovered from the Craftsman's Company, as money had and received, so much of his premiums as had not then been consumed by carrying the risk on his life—to wit, two hundred and forty-nine dollars and fifty cents, the value of his policy—for the contract being at an end by

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mutual consent, only that amount would have been in the hands of the company belonging to him.

IV. Even if the action in the common pleas had been a disaffirmance of the contract, the recovery in that court would be a liability against the Craftsmen's Company arising by force of plaintiff's policy ; for the policy would be the basis of the action.

V. It is plain that the agreement in question merely substitutes the Hope Company in the place of the Craftsman's Company, and obliges the former to do what the latter should have done, and as the latter, on breach of contract, was bound to pay the plaintiff his damages, assessed by the common pleas, the former as the substitute, is also bound to pay them

BY THE COURT.—CURTIS, J.—The liability of the defendants depends upon the effect of the agreement entered into by the defendants with the Craftsmen's Company, in reference to reinsuring, and assuming outstanding risks and liabilities. In the case of *Glen* against the defendants (56 N. Y. 379) this same agreement came before the court of appeals for construction. Their decision clearly established the right of a policy holder of the Craftsmen's Company to recover for any liability the defendants assumed as to such policy holder, though he was not a party to such agreement.

The Craftsmen's Company violated its agreement with the plaintiff by transferring its assets to the defendants, and by incapacitating itself to continue its business, and refusing to fulfill its contract of insurance. If the defendants assumed any liability of that company to the plaintiff, such assumption was not prejudiced by the fruitless efforts and suits of the plaintiff to get back the premiums he had paid, and for which it does not appear that he ever received any valuable consideration from the derelict company. If

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the plaintiff chose primarily to exhaust any remedy he might have by a judgment and execution against the Craftsmen's Company, and by another suit in the nature of a creditor's bill to reach its assets, and to which the defendants were a party, it may have added to his losses, but it does not show that he has waived his ultimate recourse against the defendants, if he has any, or that his claim has been passed upon already adversely, and is now *res adjudicata*.

The question to be here passed upon is narrowed to the inquiry whether the agreement of the defendants with the Craftsmen's Company is broad enough to embrace the plaintiff's demand. It is clear that the plaintiff is now remediless as one of that class of policy holders to whom, upon the surrender of their policies in the latter company, the defendants agreed to issue new policies of their own. If the plaintiff can now recover at all, it is under that provision of the agreement, where the defendants agree to pay the policyholders all such sums as the Craftsmen's Company might by force of such policies become liable to pay.

The words "by force" as used in that context, are synonymous with the words "by reason of" or "in consequence of." Such was apparently the intention of the parties, and viewed in the light of the attending acts and circumstances, should justly be presumed to have been so used. The evidence in the case confirms this view of the meaning of the words.

The plaintiff's claim upon the Craftsmen's Company was purely in consequence of this policy; it arose from the obligations, express and implied, of that, and did not accrue to him as a general creditor, and his seeking to recover from them the premiums he had paid when they violated their agreement to keep him insured, was not a disaffirmance of the policy. The violation of its terms in this respect, formed, as the

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referee properly found, one of the very liabilities referred to and embraced in the agreement, and which the defendants by its terms assumed.

The judgment appealed from should be affirmed with costs.

MONELL, Ch. J., concurred.

THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF NEW YORK, PLAINTIFF
AND RESPONDENT, v. THE NEW YORK AND
STATEN ISLAND FERRY COMPANY, AND
THE NORTH SHORE STATEN ISLAND
FERRY COMPANY, DEFENDANT AND APPEL-
LANT.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW
YORK, RESPONDENT, v. WILLIAM H. PEN-
DLETON, APPELLANT.

I. INJUNCTION.

1. VIOLATION OF, HOW ESTABLISHED.

a. *May be by facts and circumstances.*

- (1) The sale of a boat used on a ferry between certain points as and for a ferry boat, immediately on the rendition of a decision directing an injunction against the seller restraining him from running a ferry between these points, and the continued use thereafter of the boat for the same purposes will, *with other circumstances*, constitute a violation of the injunction.

2. VIOLATION OF, WHAT CONSTITUTES.

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a. Substance must be regarded.

1. Where there is an injunction against the running of a ferry between certain places, and after the injunction the point of departure, at one of the places is changed *from one wharf to another*, the route in all other respects continuing to be the same, *there is a violation* of the injunction, notwithstanding such change.
2. An injunction against *the use of a wharf* for any of the purposes of a specified ferry on a specified route, *is violated* by laying the boat at the wharf during the night to take in supplies of coal and water, to be used on her ferry route the next day, and for the accommodation of the boat during the night.

II. CONTEMPT, PROCEEDINGS TO PUNISH FOR.

1. INTERROGATORIES, WHEN NOT NECESSARY.

- a.* When the proceedings are initiated by an order requiring the party to show cause why he should not be punished for contempt, interrogatories are not necessary.

(1) *This although* the order to show cause does not specify in what respect an injunction order is claimed to have been violated, and what punishment is desired.

2. *Injunction not served, violation of.*

- a.* Parties *simply hearing* that an order for an injunction has been granted, and disregarding it, can be adjudged guilty of contempt.

3. *Injunction, service of.*

- a.* Service of a *certified copy* of an order of injunction granted by the court, is sufficient in contempt proceedings.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Appeal from two orders, the former adjudging both defendants in contempt, and the latter adjudging William H. Pendleton in contempt.

The suit was commenced May 21, 1875, to restrain the New York and Staten Island Ferry Company from running a ferry from New York city to the eastern shore of Staten Island without a franchise or license from the plaintiff, and also to restrain the use of

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plaintiff's wharf property at the foot of Whitehall Street for any of the purposes of such ferry.

The day the suit was commenced, a preliminary injunction was granted restraining the use of the wharf property for such purpose, and an order to show cause was therewith granted why such preliminary injunction should not be continued during the pendency of the action. A motion was also made to enjoin the running of the ferry by the New York and Staten Island Ferry Company. On June 15, 1875, the motions to continue the injunction, and to restrain the running of the ferry, were granted. The defendant's attorney read the opinion that morning. The next morning it was published in several newspapers, and the formal order of the court was entered at half-past ten, A. M., of the same day, and certified copies were between two and three, P. M., served on the defendant's attorney, and upon the pilot and engineer of the steamboat, D. R. Martin, which was used for the purposes of such ferry; and on the morning of June 17, a certified copy of the order was served upon Wm. H. Pendleton, the president of the two defendants.

After May 20, 1875, the point of departure from New York of the ferry boat, D. R. Martin, was changed to another pier, but it still continued to be used and advertised as a ferry boat upon, in other respects, the same route to and from Staten Island, with the same master and time-table, and it still continued to occupy the plaintiff's wharf property at the foot of Whitehall Street, from nine o'clock every evening until the next morning, to take in supplies of coal and water to be used on her ferry route the next day, and for the accommodation of the boat during the night.

On June 16, at noon, a bill of sale of the D. R. Martin was executed by the New York and Staten

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Island Ferry Company to William H. Pendleton, their president. The boat continued running as before, and on June 19, a bill of sale of her was executed by Wm. H. Pendleton to one Charles C. Birdseye, and thereupon, on the same day, an order was granted for both defendants and Wm. H. Pendleton to show cause why they should not be punished for contempt of court.

The motions were granted that they be punished for contempt, and from the orders entered to that effect, the defendants and Pendleton appeal.

Sidney R. Harris, of counsel for appellant, submitted an elaborate brief, in which he urged : I. The injunction order must be limited to the grounds stated in the complaint and the prayer for relief, and the defendants were not bound by the order further than it was warranted by the complaint (*Freeman v. Dunning*, 4 *Edw.* ch. 598).

II. If an injunction is capable of two constructions, proceedings for contempt will not be entertained, where a party has adopted a construction of the order, which is afterwards claimed to be erroneous (*Weeks v. Smith*, 3 *Abb.* 211).

III. An injunction should be so explicit upon its face as to apprise the party what he is restrained from doing without resorting to the bill (*Sullivan v. Judah*, 4 *Paige*, 444; *Moat v. Holbein*, 2 *Ed. Ch.* 188).

IV. These proceedings are based entirely upon information and belief. No sources of information are stated, and therefore there was before the court no legal proof of any violation of the order of June 16 or May 21, and the court had no jurisdiction to make the order therein (*Parkhurst v. Kinsman*, 2 *Blatch.* 78; *Magenis v. Parkhurst*, 3 *Green Ch. R.* 433).

V. If Mr. Birdseye uses the boat for any unlawful purpose, the court is open to any party having the right to complain against him, to use its process for the

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purpose of enjoining such use ; but Mr. Birdseye is entitled to be heard upon any such application, and his right to use his own property can not be affected by proceedings in a controversy to which he is not a party (*People v. Albany R. R. Co.*, 12 *Abb.* 171, 175, 176).

VI. There is nothing in the idea of constructive notice, as claimed by the plaintiffs. Nor is the knowledge of Mr. Harris of the decision of June 15, any evidence that Mr. Pendleton had such knowledge, as Mr. Harris testifies that he did not see or inform Mr. Pendleton until late in the day of June 16. Knowledge of the attorney is not knowledge of his client of a decision of court. In *Hilliker v. Hathorne* (5 *Bosw.* 710) it was held that it was not enough that defendant had heard in a general way that the case had been decided, but that he must have known the particulars. To the same effect is *Elliot v. Osborne* (1 *Cala.* 396). The rule in certain classes of cases that notice to the attorney is notice to the client, is limited to the ordinary and regular proceedings in the suit ; an injunction order is not within the rule, and no case can be found holding that proceedings for willful contempt can be based on knowledge of the attorney not communicated to the client. On the contrary, the rule is, that knowledge of facts will not be imputed which relate to the motives or intentions of the principal (10 *House of Lords R.* 114 ; *Ramsdell v. Craighill*, 9 *Ohio*, 197). And the idea of notice from the publication of the decision in the city newspapers is decided adversely to plaintiffs in *Morrisson v. Universal Marine Ins. Co.*, L. R. (8 *Exch.* 40) ; S. C. (4 *Eng. R.*, *Moak's Ed.* 433).

VII. We deny that the sale, if sufficient to transfer the legal title of the boat, could be an evasion of the injunction (12 *Abb.* 171). An act is not an evasion of an injunction which is strictly lawful, and against the doing of which there is no restraint, even if the effect

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should be that the injunction became inoperative. The law does not permit, by such indirection, to restrain parties, or bring them into contempt (12 *Abb.* 175). Before it can be claimed that Mr. Pendleton or the defendants have willfully violated the order of June 16, it must appear that Mr. Pendleton knew that a sale of the boat could not lawfully be made without evading the injunction. There is no proof of this, and an examination of the terms of the order would not give such information, and the want of it is fatal to these proceedings (People v. Compton, 1 *Duer*, 533).

VIII. Mr. Pendleton acted under the advice of counsel, and it is erroneous to grant an order, as for willful contempt, where the party has strictly followed the advice of his counsel (Hawley v. Bennett, 4 *Paige*, 163; Ramsey v. Erie R. R. Co., 45 *N. Y.* 637; Billings v. Carver, 54 *Barb.* 40; Erie R. R. Co. v. Ramsey, 3 *Lansing*, 178). No intention to violate an order of court can be inferred from the doing of a lawful act (12 *Abb.* 171, 175, 176, per Judge HOGEBROOM).

IX. The injunction order of May 21 was not violated by the fact that the D. R. Martin took in a supply of coal and water at Pier 1. The affidavit on the part of the defendants shows that the D. R. Martin obtained a permit from the Croton Department to take in a supply of water, which was to be delivered at that pier, and that, prior to the institution of this suit, a contract had been made for the delivery of coal to the D. R. Martin, which, by its terms, was to be delivered at that pier, and not elsewhere. It will be seen, therefore, that the D. R. Martin was necessarily obliged to resort to this pier, for the purpose of obtaining water and coal. No ferry was operated from Pier No. 1, after the preliminary injunction; no passengers or freight were transported from that pier. The D. R. Martin was, in fact, running from another pier, namely Pier No. 8. We submit, therefore, that the use of Pier

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No. 1, for coal and water, is no violation of the injunction.

X. Interrogatories should have been filed by the plaintiffs before any final adjudication upon the alleged contempt (3 *R. S.* 536 ; 1st ed. 851-510). Where the proceedings are by order to show cause, interrogatories must be filed (1 *Crary's Spec. Pro.* 159 ; 3 *R. S.* 526, 1st ed. ; Albany City Bank v. Schermerhorn, 9 *Paige*, 375 ; McCredie v. Senior, 4 *Id.* 378 ; Pitt v. Davison, 37 *Barb.* 98 ; McCredie v. Senior, *supra*). This was the practice at common law (Pitt v. Davidson, *supra*).

XI. The order to show cause in this proceeding does not show in what respect the injunction has been violated. This makes it a necessity that interrogatories be filed (Magennis v. Parkhurst, 3 *Green. Ch.* 433). And the only way that the defects of the order to show cause can be remedied, is by the filing of the interrogatories. Nor does the order to show cause state the nature of the offense, whether criminal or otherwise, nor state what punishment is asked. The English practice requires this (2 *Daniells, Ch. P.* 2).

XII. We claim that the plaintiffs have not been technically regular, because there never has been any such service of the last injunction order in this case as would justify the proceedings by way of attachment. The affidavits show that the original injunction order never was exhibited, and that only a copy was served, and such service has repeatedly been held to be insufficient (Coddington v. Webb, 4 *Sandford*—with which opinion all judges of this court concur ; Watson v. Fuller, 9 *How. Pr.* 425 ; Becker v. Hager, 8 *Id.* 68 ; see also section 302 of the Code, which requires the defendant to be duly served).

XIII. If there has been any breach of the injunction or any contempt, it has been waived (Anon, 15 *Ves.* 174 ; 1 *Daniell Ch. Pr.* 509).

Respondent's Points.

Wm. C. Whitney, corporation counsel, and *Henry E. Davies* and *Julian T. Davies*, of counsel for respondents, submitted an equally elaborate brief, in which they urged: I. The injunction is not broader than the complaint. The complaint clearly seeks two things. 1. To stop the running of an unlawful ferry. 2. To restrain the use of the plaintiff's own wharf property for the purposes of such unlawful ferry. Even if the injunction was broader than the bill, it must be obeyed (*Richard v. West*, *Green's Chan. Rep.* 456; *Peck v. Yorks*, 32 *How. Pr.* 408).

II. The property was used almost half the day as a store house at which to refurnish, refit, and preserve the boat for the succeeding day's unlawful business. This was certainly using it in violation of the order forbidding its use "in any manner in the furtherance and assistance" of that ferry (See *High on Injunctions*, sec. 866). Besides being thus used to enable the boat to violate the plaintiffs' ferry rights, by its being used to the extent stated for an unlawful purpose, the plaintiffs were exposed to claims for loss or damage (See Chap. 583, *Laws of 1873*, p. 895).

III. An injunction directed to a corporation is binding on all who are authorized to act for it, although directed to a corporation by its corporate name (*People ex rel. Davis v. Sturtevant*, 9 *N. Y.* 263; *People v. Albany & N. Y. R. R. Co.*, 12 *Abb.* 171; *Wellesley v. Mornington*, 11 *Beavan*, 181). Though a person be not a party by name, yet, under the name of "officers and members," any such who, knowing of the existence of an injunction against a party, its "officers and members" violate it, are guilty of contempt (*Rorke v. Russell*, 2 *Lansing*, 242). A party agreed not to carry on a certain business within certain limits; *held*, that he was bound not to carry it on as agent for another person, when himself enjoined from carrying on the business (*Ewing v. Johnson*, 34 *How.* 202). *Held*, that defendant,

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who had permitted another person to erect a fence on defendant's land, which defendant was enjoined from erecting, was guilty of a contempt, because he had the power to prevent the fence being erected (*Wheeler v. Gilsey*, 35 *Id.* 139). As to officer or agent being bound by an injunction against his principal or employer (see cases cited). The president of the City Bank of Buffalo was adjudged guilty of contempt when, by concealing from other officers of the bank the service of an injunction, the effect of the order was lost as they proceeded to do the acts enjoined (*Bank Commissioners v. City Bank of Buffalo*, cited in 1 *Barb. Chan. R.* 636).

IV. The injunction becomes operative from the time of the order for it, not from its date, or from the time of its being drawn up (*High on Injunctions*, sec. 852, also secs. 853 and 854; *Osborn v. Tannett*, 14 *Vesey*, 136; *Money v. Jordan*, 13 *Beavan*, 229; *St. John's College v. Carter*, 4 *Mylne, &c.*, 497; *Blood v. Martin*, 21 *Geo.* 127; *Woodward v. Earl of Lincoln*, 3 *Swanston*, 626). Parties hearing of an order for an injunction being granted, and disregarding it, can be adjudged guilty of contempt (*Hull v. Thomas*, 3 *Edwds. Ch.* 236). Service on a solicitor is good and sufficient to bring party into contempt, and sustain commitment (*People ex rel. Morrison v. Brower*, 4 *Paige*, 405). Where defendant has knowledge that an order has been issued, he will be liable for contempt if he disobey it (*Livingston v. Smith*, 23 *How.* 1; *Ewing v. Johnson*, 34 *Id.* 202; *Matter of Feeny*, 4 *Bank. Reg.* 70 or 223).

V. The entire circumstances of this case made it apparent that there was a violation, and that it was carefully planned, and was willful, and therefore criminal (*People v. Compton*, 1 *Duer*, 512).

VI. The business transacted between Staten Island and New York has been, and is to be, regarded as a

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ferrying business (Matter of Sylph, 4 *Blatch*. 24; Conway, *et. al. v. Taylor's Executor*, 1 *Black*, *U. S. Sup. Ct.* 603; The Elizabethport and N. Y. Ferry Company v. The United States, 5 *Blatch. C. C.* 198).

VII. A United States coasting license gives no authority to operate a ferry, and does not override state laws in regard to ferries (Gibbons v. Ogden, 9 *Wheaton*, 203; Conway v. Taylor's Executor, 1 *Black*, *U. S. Sup. Ct.* 603; Fanning v. Gregoire, 9 *How. (U. S.)* 534; The Elizabethport and New York Ferry Co. v. United States, 5 *Blatch. C. C.* 198). Our own state courts have upheld this view (Steamboat Co. v. Livingston, 3 *Cow.* 754).

VIII. The opinion of Judge SPEIR evidently characterizes the conduct of defendants and of Pendleton as a "willful disregard" of the injunction order. It is therefore punishable as a "criminal contempt" (See page 288, 2d vol. *Edm. Stat.* sec. 10, sub. 3; also page 553, sec. 1, sub. 3). When an order to show cause is granted upon affidavits, further proceeding by interrogatories is not necessary. The court can order punishment directly upon the affidavits (Yates v. Lansing, 9 *Johns.* 419; King v. Vaughan, *Doug.* 516; 4 *Blk. Com.* 287; Watson v. Fitzsimmons, 5 *Duer*, 629; Taylor v. Baldwin, 14 *Abb. Pr.* 166; Pitt v. Davison, 37 *N. Y.* 235; People v. Campbell, 40 *Id.* 133, 137; Brush v. Lee, 1 *Abb. Ct. of Ap.* Dec. 238). In fact, interrogatories were not necessary, as every fact alleged as misconduct was admitted, except knowledge by Pendleton of the decision of June 15, and on interrogatories nothing but this denial would have been elicited from him. The only other denials were of intentions, and as to this, the court need not take proof unless it desires it (Lathrop v. Clapp, 40 *N. Y.* 335, 338; Batterman v. Finn, *Id.* 340). For a full discussion of practice, of right to punish,

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amount of punishment and allowance, costs and counsel fees, see *People v. Compton* (1 *Duer*, 512).

IX. In proceedings against parties, the papers should be entitled in the action (*Brown v. Andrews*, 1 *Barb.* 227; *The People, ex rel. Young v. Craft*, 7 *Paige*, 325; *Stafford v. Brown*, 4 *Id.* 360). In proceedings against persons, not parties by name, the papers should be entitled in the action down to the order, declaring them in contempt—that order and all subsequent papers should be in the name of the people on the relation of the person prosecuting (*Stafford v. Brown*, 4 *Paige*, 362; *Folger v. Hoogland*, 5 *Johns.* 235; *People v. Ferris*, 9 *Id.* 160).

BY THE COURT.—CURTIS, J.—The plaintiffs insist that the use made of the property by the New York and Staten Island Ferry Company, after May 21, was a violation of the terms of the order of that date, and that the North Shore Staten Island Ferry Company and its officers also violated such order in permitting such use. They further insist, that the transfer of the boat "D.R. Martin," was made at such a time and under such circumstances as to show that it was not a regular business transfer, made for the sole purpose of disposing of all interest in, or connection with, the boat and its future use, but that it was so planned and consummated that, though the nominal title passed, the substantial right of property and control of the boat remained with those who previously had it, thus furnishing them with means for deceiving the court, and with a cover under which to defy its orders, and to continue a violation of law, and of the plaintiff's rights.

The appellants claim, that their use of the plaintiff's wharf at the foot of Whitehall Street was not a violation of the order of May 21, and that the sale of the ferry boat, by the New York and Staten Island Ferry

Company, to its president, Pendleton, June 16, was without notice of the decision, and was in good faith and for value, and that his sale to Birdseye on June 19, was also for value, and was made to avoid even the appearance of a violation of the injunction by the New York and Staten Island Ferry Company.

The appellants further claim, that after Wm. H. Pendleton became the owner of the boat in his individual capacity he was not restrained by the injunction, and that he had the right to use it as he did after June 16, to run a ferry from New York to Staten Island, and that Birdseye or any other person who succeeded him as owner, succeeded to the same rights.

The claim of the appellants, that the sale of the ferry boat was without knowledge of the decision, and was in good faith, and with no intent that she should be run in violation of the injunction, meets with some difficulties. It is not a conclusive circumstance, but it is a remarkable coincidence, that the sale of the boat to Mr. Pendleton should have been made on June 16, the very day the injunction order was entered, and it is extraordinary that neither the defendants nor Mr. Pendleton had heard or read of this decision, which had been already spread before the public generally by the press, and which in so important a manner affected their business, and which their attorney had read the previous morning.

It is but reasonable to suppose the attorney would have notified his clients at once of this decision, and it is strongly and repeatedly urged in the appellants' points, that he testifies, that "he did not see or inform Mr. Pendleton" of it until about 3 P.M. of June 16, and after the sale of the boat. The affidavit of the attorney does not sustain this view of it, and while it omits to state whether or not he notified Mr. Pendleton of this decision on the previous day, it uses this language, "It is true deponent read the opinion of Justice VAN

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VORST, the forenoon of June 15, but deponent did not see Mr. Pendleton until the afternoon of June 16, about 3 P.M. as nearly as deponent recollects. That Wm. H. Pendleton resides at Staten Island; that deponent spoke to Mr. Pendleton about said decision, when he called to see deponent on the afternoon of June 16, for the first time." If he could have corroborated Mr. Pendleton's statement by saying that he omitted to notify him previously to this interview he could have so stated, as it is of comparatively little importance when he first "spoke" to him about it.

Again there is an additional circumstance not calculated to inspire confidence in the good faith of the sales of the boat. They are made for the apparent consideration of one dollar, but it is claimed by Mr. Pendleton that as a consideration he further assumed an indebtedness of the company amounting to fifty thousand dollars and upwards, incurred by the company in respect to the boat, and that Mr. Birdseye, when he bought, assumed the payment of the same indebtedness, and relieved Mr. Pendleton of his responsibility. It is singular that in transactions of this magnitude, and in the assumption of the payments of debts of third parties, there appears to have been no instruments executed to give them effect and validity, at least none are presented in the papers, nor is the appellants' statement strengthened by the omission by the other officers of the company and by Mr. Birdseye, to say anything in corroboration. These transfers of the boat, do not seem to have been for an adequate consideration stipulated between the sellers and the purchasers, and made in the ordinary and prudent transaction of business, and when considered in connection with the continued running of the boat for the same ferry purposes, after the sale by the company, and with the other difficulties of the appellants case previously remarked, confidence is not inspired in the good faith

of the sale, and the desire to avoid violating the injunction claimed by the appellants.

In the plaintiff's moving papers it is alleged that Mr. Pendleton, the president of the companies, has publicly declared his intention of evading the injunction and process of this court, by further transfers of the said boat, and that said Pendleton in such connection has made use of the following words: "If he brings an injunction against me as a private individual, I shall sell out to the first purchaser, and shall continue to fight if the boat has to pass through the hands of all the people in the city. In this way I think we shall keep him very busy in bringing injunctions against us."

In answer to this, Mr. Pendleton, in his affidavit, denies that he has declared, *as is stated in the moving affidavits*, his intention, publicly or otherwise, of evading the injunction in this action, or either of them, or which may be commenced, or that he has any such intention.

When the allegation and the denial are placed in juxtaposition, it requires no comment to show that there is a failure to make that clear, full, and unequivocal denial of the words, or words to the effect of those charged.

Among the ancient grants from the crown to the plaintiffs, none was more full and complete than that of the ferry franchises, rights, and fees, from New York Island to points on the shores round about. Hedged in by constitutional and legislative restrictions, and its possession retained against contestants, who urged all that research, learning and matchless ingenuity could accomplish to get possession of it, this grant yet remains still one of the most valuable assets of the city, and constitutes the only means by which the city collects any compensation from thousands for the protection of whose persons and property she incurs heavy annual expenditures.

At the same time at which this appeal was argued, the appeal from the order continuing the injunction was also argued, and has, by the concurrence of the same judges, been affirmed, thus establishing the right of the city to the ferry franchise.

But the present appeal does not involve that question, but simply whether the appellants have violated the injunction orders of the court in using and interfering with such right. It is apparent that if by pretended sales of the ferry boats to persons who have not been or can not be served with process, and then keeping them running on the ferry routes, the effect of the injunctions can be avoided, that it is simply a mode of unlawfully seizing upon and using the public property. Justice should be slow to give effect to a wrong, and when that wrong is sought to be accomplished by such a course of proceedings as is here shown on the appellants part there must be some remedy.

The occupation of the plaintiff's wharf at the foot of Whitehall Street after May 21, was a violation of the order of that date, and it is impossible, after considering the proofs, to come to any other conclusion than that the sale of the ferry boat made June 16 was made after notice of the decision granting the injunction, and that it was made in bad faith, and for the purpose of evading the injunction of June 16, and of continuing the running of the ferry, and that the further sale of June 19 was merely a part of the same scheme.

These ingenious and plausible devices resorted to by the appellants, to still retain and use the plaintiff's property notwithstanding the injunction orders of the court, serve only as indications and proofs of their willful intention to violate them. Public property, as well as private, is entitled to the protection of the law, and can not be wantonly invaded and seized, nor can the arm of the law be made powerless, by a reckless

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disobedience or fraudulent evasions of the orders of the court. If the doctrine of the appellants was to prevail, there would be a speedy end of property.

But the latter take the position that under any circumstances the plaintiffs are not entitled to an attachment against them, because the proceedings are irregular, as interrogatories were not filed before the final adjudication upon the alleged contempt. In support of this, the case of *Pitt v. Davison* (37 *Barb.* 98) is cited, and if it had not been called in question, it would have gone far to establish the appellants' claim. But when this case reached the court of appeals (reported in 40 *N. Y.* 233), it was reversed, and the court held that where the proceeding is by order to show cause, as in the present case, no interrogatories need be filed to enable the party to purge himself of the contempt alleged. The party charged has an opportunity to make his defense by affidavits.

The objection that the last injunction order was not served in such a way as would justify the proceedings by attachment is without force, as the papers show that certified copies of it were served upon both the attorney and Mr. Pendleton. Even parties simply hearing that an order for an injunction has been granted, and disregarding it, can be adjudged guilty of contempt (*Hall v. Thomas*, 3 *Edw's. Chy.* 236; *People ex rel. Morrison v. Brown*, 4 *Paige*, 405; *Osborne v. Tannent*, 14 *Vesey*, 136).

Neither is the objection, that if there has been any breach of the injunction or any contempt, it has been waived, tenable. The proofs fail to show any waiver, and the case cited by the appellants (*Anon.* 15 *Vesey*, 174), is not analogous to the present case, and if it was it would not vary the procedure directed by the Code.

There appears to be no just reason why the orders appealed from, imposing fines and imprisonment for the

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violation of the injunction should not be affirmed with costs.

MONELL, Ch. J., concurred.

THE REPUBLIC OF PERU, PLAINTIFF AND RESPONDENT, v. EDGAR H. REEVES, DEFENDANT AND APPELLANT.

I. REVIVOR.

1. SOLE DEFENDANT, APPLICATION TO REVIVE BY REPRESENTATIVE OF, WHEN NOT GRANTED.

1. *Can not be granted, unless the deceased defendant had before his death acquired rights or benefits in the litigation.*

(a) *Trade-mark case.* Where an action is brought to restrain the defendant from using and imitating trade-marks, and selling spurious for genuine articles, and for damages, and, after answer, a *temporary injunction* was granted on notice to the defendant, and without any opposition from him, and no motion was made by him to vacate or modify the injunction, and the defendant died before the case was tried,

Held, that
a motion made by the administratrix of the defendant that the action continued against herself as such administratrix should be denied.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Appeal by Anna S. Reeves, administratrix of Edgar H. Reeves, the defendant deceased, from an order made September 30, 1875, denying her motion to have the action continued against herself as such administratrix.

The plaintiff sues as a sovereign state. It claims to

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have been for the past eighty years and upwards the sole owner of the natural deposits of guano in the Chinchá and Guanape Islands, and, since 1865, to have carried on the business, through its agents, of exporting it to the United States, and selling it there.

This action was brought to perpetually restrain the defendant from using and imitating the trade marks used by plaintiff in the sale of Peruvian guano, and from selling mixed and spurious guanos as the genuine, and for damages for such use, imitation and sales.

A temporary injunction was granted on July 24, 1873, which was continued in force until the further order of the court, by an order made on notice to the defendant, on October 7, 1873. This was after the defendant had answered, and he did not oppose the continuance of the injunction, and never moved to vacate or modify it.

The action has never been tried. The defendant died November 10, 1874.

A. J. Perry, attorney, and of counsel for appellant, urged: I. The cause of action survives (2 *R. S.* 447). It is to redress "a wrong done to the property, rights, or interests of another, for which an action might be maintained against the wrong doer."

II. If the cause of action survive, the action does not abate by death (*Code*, § 121).

III. The subject-matter of the order is a substantial right, and appeal from the order lies to the general term (*St John v. Croel*, 10 *How.* 253; *Norton v. Wiswal*, 14 *How.* 42, 46).

IV. The defendant, at his death, had acquired such an interest in the prosecution of the action as entitles his representatives to have it continued. Costs had accumulated, counsel fees had been incurred, and injunction had been issued, which interfered with and injured his business, and damages may have been suffered—all to the certain detriment of the estate, if the order is per-

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mitted to stand ; and as to all of which the estate may derive protection and indemnity if the action proceeds (*Livermore v. Bainbridge*, 49 *N. Y.* 125).

Duncan Smith, of counsel for respondent, urged :

I. Under the Revised Statutes, an action at law abated on the death of a sole plaintiff or defendant before interlocutory or other judgment or verdict, and no proceedings could be had to revive it (2 *R. S.* 386, 388). In equity, a suit abated by the death of a sole complainant or defendant, the complainant or his representative could revive ; but no such right existed on the part of the defendant. If the sole defendant died, his representatives could not revive the suit unless the deceased defendant had acquired some right under a decretal order therein (*Souillard v. Dias*, 9 *Paige*, 393).

II. Section 121 of the Code has not changed the former practice, which confined the right of continuing the action to the complainant or his representatives, unless the defendant had acquired some rights in the litigation (*Keene v. Lafarge*, 1 *Bosworth*, 671 ; *Livermore v. Bainbridge*, 49 *N. Y.* 125).

III. The rights acquired by a deceased defendant, which would entitle his representative to have the action continued, must either arise under a decree or decretal order, or from some proceeding in the action by which the defendant had become an actor (*Supra*, *Souillard v. Dias* ; *Livermore v. Bainbridge*). In *Schuscharde v. Reimer* (1 *Daly*, 459), "the defendant died, after he had obtained judgment against the plaintiffs for costs, and after they had appealed from the judgment."

IV. The defendant in this case had acquired no such rights in the litigation, nor are there any circumstances in the case which would justify the exercise of the power to compel the plaintiff to continue against its

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wish. There has been no decree or interlocutory order in the action ; no counter-claim is set up in the answer. If it be said that the defendant would have been entitled to prove that he was damaged by the injunction, in case it had appeared as the result of the trial, that the plaintiff was not entitled to it, the answer, in the first place, is, that the defendant rested quietly under the injunction for more than a year, without any effort to vacate or modify it, which he would not have done if he had been damaged by it, and could have shown that plaintiff was not entitled to it. And the defendant had in no respect become an actor in the suit up to the time of his death.

BY THE COURT.—CURTIS, J.—The only question presented by this appeal is, whether upon the death of a sole defendant after issue joined and before a trial, his administratrix has the right to have the action continued against herself.

The Code, section 121, as interpreted by the courts, does not sustain the claim of the appellant, that by it such a right is conferred (*Keene v. La Farge*, 1 *Bosw.* 671 ; *Kissam v. Hamilton*, 20 *How. Pr.* 377). The practice, as it was before the adoption of the Code, and as governed by the Revised Statutes, remains in force in this respect. It would be often unjust in a case where the defendant interposed a counter-claim, or acquired rights or benefits in the litigation before his decease, that his representatives should be debarred from having the action continued against them upon their motion. In these contingencies when existing rights should be protected, the law is construed to give the right to the representatives of the deceased defendant to have the action continued against them, and to apply for this relief by motion upon papers showing a proper case (*Livermore v. Bainbridge*, 49

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N. Y. 125; *McDermott v. McGowan*, 4 *Edw.* 592; *Souillard v. Dias*, 9 *Paige*, 393).

The difficulty in the present case is, that the appellant fails to show that the defendant had acquired any rights in the litigation, or that any prejudice would result to the estate by not continuing the action. The appellant's affidavit upon which the motion was made, sets forth nothing of that nature. The admission of her counsel stated in the order appealed from, that "October 7, 1873, upon notice to the defendant, and without opposition from him, an order was made in this action, continuing in force until the further order of this court, the injunction order theretofore made in the action, and that the defendant never made any motion to vacate or modify the said injunction," would seem to indicate there was no serious grievance or detriment in consequence which the appellant could establish by affidavit.

It does not appear that the appellant would derive any benefit from having the motion granted. See *McDonald v. James* (38 *Superior Ct. Rep.* 76), and no case is shown calling for the exercise of any discretionary power on the part of the court to grant it.

The order appealed from should be affirmed with costs.

MONELL, Ch. J., concurred.

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ALFRED H. WILMONT, PLAINTIFF AND APPELLANT, v. CORNELIUS W. MESEROLE, AND OTHERS, DEFENDANTS AND RESPONDENTS.

I. EXAMINATION OF PARTIES BEFORE TRIAL AT THE INSTANCE OF THE ADVERSE PARTY.

1. EFFECT OF, AS TO A FURTHER EXAMINATION AT THE TRIAL.

(a) *Precludes such further examination at the trial on the same subject-matter by the party at whose instance the examination before trial was had, and who at the trial read such examination,*

UNLESS

some reason or excuse is shown, *such as the omission by inadvertence to ask some questions, or prove some facts.*

Before MONELL, Ch. J., and CURTIS, J.

Decided January 8, 1876.

Appeal by the plaintiff from a judgment dismissing the complaint as to the defendant, Cornelius Meserole, upon the merits of the action, and further dismissing the complaint as to the remaining defendants, Washington J. Moore and Jackson M. Yauger.

This action is brought to have certain articles of co-partnership entered into on October 31, 1872, between the plaintiff and the defendant Meserole reformed, on the ground of an omission, by defendant Meserole's fraud, to embody their oral agreement, and also to have four several instruments relating to the dissolution of the co-partnership, and the transfer of certain of its assets, set aside as fraudulent and void, and for an accounting by each of the defendants, and for a receiver.

The complaint further charges the defendants Moore and Yauger with having succeeded to the co-partner-

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ship business with knowledge of the plaintiff's rights in the premises, and with intent to defraud the plaintiff.

The answer of the defendant Meserole puts in issue the allegations of fraud and fraudulent intent, and denies that there was a mistake in the copartnership, or that they did not correctly embody the alleged oral agreement.

The answer of the defendants Moore and Yauger denies the allegations of fraudulent intent on their part, or knowledge of the alleged rights of the plaintiff.

Charles Meyer, attorney and of counsel for appellant, on the point stated in the head note, urged : I. It was error to exclude the further examination of the witness Washington I. Moore ; evidence of knowledge of Meserole's fraud on the part of Moore & Yauger was thereby excluded. He had been sworn without objection, after his deposition had been read. Any objection to his competency on the ground that his deposition had been previously read, should have been made before the witness was sworn. This not being done, the objection was waived, and the refusal to permit the witness to testify was error.

II. The objection was not to the examination of the witness, but to his further examination. If competent to be examined, he was certainly to be further examined.

III. The fact that the witness had been examined before trial, and his deposition read in evidence did not render him incompetent as a witness on the trial.

1. The Code provides that a party to an action may be examined at the instance of his adverse party under the same rules of examination as any other witness (§ 390). It is further provided that the examination may be had before trial (§ 391). The Code does not provide that the examination can be had on only one of these two occasions ; and the liberal, fair and just construction of the

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statute is that the examination may be had on either or both occasions (see definition of the word "either."

Webster's Dictionary, Unabridged. Worcester's). The policy of equity is to elicit all the facts material to the issues, to exclude none that may by any possibility shed light upon the controversy, to construe statutes conferring competency with liberality, and to that end to permit the examination of any witness where it does not clearly appear that he is incompetent. 2. Under these sections of the Code it has been held that a party may be examined by his opponent before issue joined (*McVicar v. Ketchum*, 4 *Robt.* 657), and before complaint served (*Havemeyer v. Ingersoll*, 12 *Abb. N. S.* 301). These examinations are had for the purpose of preparing the examining party's case for trial or his complaint, and the examination is conducted with that view. It would be manifestly improper to prevent a further examination being had at the trial for the purpose of proving facts by the same witness, of which purpose it was not desirable to apprise him (he being adverse) before trial, lest this purpose might be defeated; or for the purpose of proving facts which have come to the knowledge of the examining party since the examination before trial, which may have taken place months or even years before. 3. The Code, in removing incompetency from a party intended, and its only purpose was, to obtain from him all the facts within his knowledge material to the issue (§ 390, Code). By a subsequent section, it gave cumulative means of ascertaining such facts (§ 391). This was not intended as an optional substitute for § 390, but as cumulative. Its purpose, and only purpose, was to enable a party to gain from his adversary evidence necessary for the preparation of his complaint or for trial. 4. § 392 provides, that such examination may be read by either party at the trial, but does not add "in lieu of his oral examination," and the adoption of

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that means for that purpose does not prevent a further examination at the trial where the purpose is to elicit other facts material to the issues, which purpose it was not desirable to disclose to the adverse party before trial, or which purpose the examining party may not then have had.

IV. It is discretionary with the court to allow a witness to be recalled. This was simply recalling the witness at the trial after his examination before trial. 1. The court seldom, if ever, refuses to recall a witness for further examination, and such refusal should be upon grounds of objection, rendering the further examination manifestly improper. No such grounds appear in this case. 2. The exercise of discretion against the further examination of the witness was legal error, so intimated in *Romertze v. East River National Bank*, 49 *N. Y.* 582, where the court below refused to permit a witness to be recalled for further cross-examination. The recall here being for examination-in-chief, the case is stronger. Where there is a doubt in the mind of the court as to the propriety of permitting the recall of a witness for further examination, such doubt should be in favor of the recall, lest material testimony be otherwise excluded.

Wellesley M. Gage of counsel for respondents, Moore and Yanger.

BY THE COURT.—CURTIS, J.—The case presented by the testimony of the plaintiff is one of gross imposition and fraud. He claims that his partner, the defendant Meserole, by falsely representing to him that their firm was insolvent, and about to be put in bankruptcy, and without giving him time to consult counsel, induced him to sign a dissolution of the co-partnership, and convey all the assets of the firm to him including a valuable lease, and that this was done for no other con-

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sideration than the inadequate one that Meserole would pay the debts of the firm. The plaintiff also asks to have the articles of co-partnership reformed, alleging that by reason of the fraudulent acts of the defendant Meserole, they fail to embrace a part of the preliminary oral agreement between the parties.

The plaintiff, by his testimony, states that which, if true, appeals strongly for the interposition of a court of equity. But the judge before whom the cause was tried at the special term found, in substance, that the plaintiff's charges of fraudulent motives and fraud on the part of the defendant Meserole, were groundless; that there never was any oral agreement of co-partnership between the parties; that the articles of co-partnership fully expressed the intent and agreement of the parties; and that there was no fraud on the defendant Meserole's part in the preparation or execution of them.

He further found, that at the time of the dissolution, the co-partnership was insolvent, with liabilities to the extent of thirty-six thousand nine hundred and forty-three dollars and eighty-three cents over and above its assets, that the dissolution and transfer of plaintiff's interest in the business, lease and other assets of the firm were drafted by an attorney employed by both parties, and in pursuance of the plaintiff's written instructions to that effect, and that the defendant Meserole paid him a consideration of two thousand dollars.

The testimony of the plaintiff, as to the alleged fraudulent acts of his partner Meserole, is uncorroborated by other evidence, and a careful perusal discloses intrinsic difficulties and contradictions, especially in relation to the preparation of the written instructions to the attorney for the drafting of the instruments sought to be set aside. But a further examination of the voluminous case shows that plaintiff's evidence is in conflict with that of the defendant Meserole, and that of the attorney who prepared the instruments, and also with

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that of the book-keeper, Sproull, and is also in some respects, contradicted by other witnesses. In addition to this, the documentary evidence sustains the defendants case.

Under these circumstances, it is not easy to see how the learned judge at special term, whose decision we are asked to review, could have arrived at any other conclusion than one in the defendant's favor.

The plaintiff excepted to a ruling of the court sustaining an objection to his further examining the defendant Moore. The plaintiff had exercised his option to examine the defendant, pursuant to § 390 of the Code, before trial. His examination and cross-examination, taken on October 15, 16, 17, 19, 20, 21, and 26, immediately preceding the trial, was read in evidence at the trial by the plaintiff, who then called him, and identified certain papers, and then proceeded to examine him as to what was said by the defendant Meserole, the witness having already been examined by the plaintiff in respect to conversations with Meserole. This was objected to, and no reason or ground being assigned by the plaintiff for a departure from the ordinary course of the examination of witnesses, or anything presented by which the court could see any occasion or propriety for repeating or renewing the examination-in-chief, the objection was properly sustained. It was not claimed by the plaintiff that this defendant had not already been fully examined upon the issues in the action, nor was it even suggested that by inadvertence some questions were omitted (*Clark v. Vorce*, 15 *Wend.* 193).

Though § 392 of the Code provides that such examination may be read by either party at the trial, and does not add the words "in lieu of his oral examination," it by no means follows that the party reading the examination has the right to an oral examination as to the same subject-matter. Such a result is at variance with the theory of the Code which was adopted

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by the legislature with the view of simplifying the practice and proceedings of the courts, and which is illy consonant with the idea that a plaintiff, after reading at the trial an examination of a defendant, the taking of which extended through a number of days, should then be at liberty to re-examine the witness orally as to the same subjects without showing any reason or excuse therefor.

There are other exceptions by the plaintiff taken at the trial, but none that call for a reversal of the judgment.

It is apparent that, as the plaintiff fails to establish his charges of fraud against the defendant Meserole, that the charges of fraudulently assisting him made by the plaintiff against the defendants Moore and Yauger, must fall. There is no evidence that implicates them in any fraudulent acts or designs.

The judgment appealed from should be affirmed with costs.

MONELL, Ch. J., concurred.

Statement of the Case.

THE PRODUCE BANK OF THE CITY OF NEW
YORK, PLAINTIFF, v. JOSEPH MORTON, LEON
WEIL, ALPHONSE WEIL, AND AUSTIN BALD-
WIN, ASSIGNEE, ETC.

I. FRAUDULENT ASSIGNMENT OF PARTNERSHIP PROP-
ERTY.

1. ACTION BY A JUDGMENT CREDITOR, ON HIS OWN BEHALF AND BEHALF OF ALL OTHER JUDGMENT CREDITORS, TO SET ASIDE,—FOR A RECEIVER OF THE ASSIGNED PROPERTY,—AND FOR THE PAYMENT OF HIS DEBT.

(a) WHEN NOT MAINTAINED.

1. Where there were *three partners* who made an assignment, and the judgment obtained by the creditor was so obtained on a *service of the summons on but two, and was in form against those two only*, and the execution was issued against *all three*, and returned unsatisfied,

Held,

the action could not be maintained, because the *remedy at law*, by judgment and execution returned unsatisfied *against the three*, had not been exhausted.

II. AMENDMENT, WHAT WILL NOT CURE THE DEFECT.

- (a) An amendment granted at the trial amending the judgment *nunc pro tunc* by *adding the name of the third partner*, as one of the parties against whom judgment was rendered, will not.

II. NEW TRIAL.

1. MOTION FOR, AT GENERAL TERM, UNDER § 267 OF CODE.

2. FINAL JUDGMENT, WHAT DOES NOT CONSTITUTE.

- (a) One setting aside a transfer as fraudulent and void, appointing a referee to take the accounts of the transferee, and a receiver to whom the transferee shall deliver and pay according to the report of the referee, and directing that the receiver pay to the plaintiff his claim out of what shall come into his hands, and hold the residue, if any, to abide the further orders of the court, is not.

3. JUDGMENT.

1. Not a bar to a motion for a new trial. *Laws of 1882, chap. 128.*

Statement of the Case.

Before MONELL, Ch. J., and CURTIS, J.

Decided January 3, 1876.

Motion by the defendants for a new trial, on a case and exceptions, under section 268 Code, subdivision 1.

The defendants, Joseph Morton, Leon Weil, and Alphonse Weil, co-partners, made an assignment of their property, in trust for their creditors, to the defendant Baldwin, February 4, 1874. The plaintiff sued the defendants Joseph Morton, Leon Weil and Alphonse Weil on a promissory note, June 22, 1874. The summons and a copy of the complaint were served only on the defendants Morton and Alphonse Weil, and judgment was entered against them only, by default, July 14, 1874, and docketed against them alone, in this court, and in the office of the clerk of the city and county of New York, after the filing of a transcript.

An execution was issued, apparently, upon this judgment, January 17, 1875, against the property of all three defendants, including Leon Weil, who had not been served, and against whom judgment had not been entered. The execution was returned wholly unsatisfied, February 4, 1875, and thereupon this action was commenced to set aside the assignment as invalid, and to reach the assets assigned to the defendant Baldwin by the other three defendants.

At the trial, after the defendants' objections to the various proceedings in the suit at law had been overruled and excepted to, and after the defendant had moved to dismiss the complaint, the plaintiff obtained an amendment *nunc pro tunc* of the judgment and docket by adding the name of Leon Weil. The judge found, that the proceedings at law were sufficient, and decided that the assignment was invalid, and ordered an accounting before a referee, and gave directions with respect to the confirmation of the report. He

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also directed that the disposition of any residue that there might be of the fund should abide the further order of the court, and granted leave to either party to apply for such other or further judgment as might be just.

The defendant excepted to the decision.

Fransioli, Tilney, and Mosher, of counsel for defendants, in support of the motion, urged, upon the points discussed and decided by the court: I. The proper course to obtain a review by the general term of the findings and of the rulings on the trial, at the present stage of this case, is by motion for a new trial (Code, sec. 268; *Church v. Kidd*, 3 *Hun.* 254; S. C., 5 *Thomp. & Cooke*, 454; *Douglass v. Douglass*, 5 *Hun.* 140; *Stanton v. Miller*, 65 *Barb.* 58; S. C., 1 *T. & C.* 23; *Mundorff v. Mundorff*, 1 *Hun.* 41; S. C., 3 *T. & C.* 170); 1. The decision filed under section 267 of the Code directs that the defendant Austin Baldwin account before a referee for all the property and effects or the proceeds thereof, received or held by him pursuant to the assignment, and that a receiver be appointed to take charge of such property and effects, The plaintiff alleges that the defendant has received over three thousand dollars, and that the assigned property is of the value of nine thousand dollars or over. On the other hand, the defendants allege that the assignee has distributed all of the money except three hundred and sixty dollars and ninety-four cents. No evidence in support of these allegations was offered by either side on the trial; and it would have been premature to do so. Therefore, until the accounting shall be had, it will be uncertain how much money or property is to be delivered to the receiver, or what questions may arise on the accounting, and the judgment is not final (*Prentiss v. Machado*, 2 *Robt.* 66C; *Lawrence v. Farmers' L. & T. Co.*, 15 *How.* 57 [*Sup' r. Ct. G. T.*]; *Wood v. Hunt*, 38 *Barb.* 302, 311 [*I*

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Dist.]; *Swarthout v. Curtis*, 4 *N. Y.* 415; *Chittenden v. Missionary Society*, 8 *How.* 327 [*Ct. of App.*]; *Catlin v. Grissler*, 57 *N. Y.* 363, 370). 2. The findings direct the receiver to pay to the plaintiff out of the property and effects to be placed in his hands the costs of this action, and the amount of the plaintiff's original judgment, with interest. The plaintiff's original judgment is four hundred and fifty-eight dollars and fifty cents. If the plaintiff should succeed in charging the defendant Baldwin with three thousand dollars, or nine thousand dollars, according to the allegations of the complaint, what is the receiver to do with the surplus? On this point the findings are wholly silent. But the order or judgment entered thereon expressly directs him "to hold the residue, if any there be, to abide the further order of this court." The plaintiff's action is brought on behalf of itself and all other judgment creditors. The residue remains to be disposed of, and therefore the decision does not authorize a final judgment (*Code*, sec. 268; *Tompkins. Hyatt*, 19 *N. Y.* 534).

II. The plaintiffs failed to show that they have exhausted their remedy at law. 1. The judgment in the common law action was entered and docketed only against Joseph Morton and Alphonse Weil, the two debtors who had been served with process; therefore it could not be enforced against the joint property of Joseph Morton, Leon Weil and Alphonse Weil (*Code*, sec. 136, subd. 1; *Northern Bank v. Wright*, 5 *Robt.* 604; *Lahey v. Kingon*, 13 *Abb. Pr.* 192; *Stannard v. Mattice*, 7 *How. Pr.* 4; *Pardee v. Haynes*, 10 *Wend.* 630; *Nelson v. Bostwick*, 5 *Hill*, 37, 41). The defect is not merely formal, but is one of substance (*Nelson v. Bostwick*, *supra*). 2. Viewing the plaintiff's case in the most favorable light, they simply had the ability to enter judgment against Leon Weil, and failed to do so. In other words, Leon Weil is in the position of a defendant in default, against whom judgment has not yet

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been entered. But it has never been pretended that the plaintiff could issue execution or commence a creditor's suit against a defendant in default, without perfecting judgment. 3. The difficulty is not obviated by the amendment of the judgment and docket made *nunc pro tunc* after the trial of this action (*Farnham v. Hildreth*, 32 Barb. 277).

David J. Newland, attorney and of counsel for plaintiff, in opposition to the motion urged, on the points discussed and decided: I. This is not a case within the provisions of section 268; and therefore the defendants are not entitled to the provisions of that section. For, 1. Such a motion is only allowable where the decision filed under section 267 of the Code does not authorize a final judgment (sec. 268, Code). 2. But the decision in this cause, the findings by court, does authorize a final judgment. 3. The accounting and reference provided for in the decision was not to obtain any fact to be used for or requisite to the entering of final judgment, nor was the entry of the judgment subject to the reference. 4. The decision of the court found all the facts requisite for, and therefore authorized, a final judgment. As (a) That the assignment was null and void as to the plaintiff. (b) That the plaintiff was entitled to the payment out of the property or proceeds in the hands of the assignee, Baldwin, belonging to Morton, and the Weils, the assignors, of its judgment against said assignors, to wit, of four hundred and fifty-eight dollars and fifty cents, and interest, and the costs of this action. This was all a certain, definite sum. (c) And the accounting provided for in the decision was intended to occur, and actually began, after final judgment, and its only object was to place the moneys held by Baldwin, who, after the decision, is a mere stakeholder, a mere stranger without any title or interest in the fund, in the hands

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of the court, by its receiver, to satisfy the plaintiff's judgment. 6. The only cases decided, cited below, since the amendment to section 268 of the Code, in 1867, allowing this practice, show and hold that this section applies only to cases in equity where what was formerly known as an interlocutory decree was entered (*Stanton v. Miller*, 65 *Barb.* 58; *Church v. Kidd and ors.*, 3 *Hun*, 254; *Bolles v. Duff*, 38 *How.* 504). (a) But an interlocutory judgment, as formerly known, "was one sounding in damages, and where the issue is an issue of law, or when an issue of fact, not tried by a jury, is decided in favor of the plaintiff, then the judgment is, that the plaintiff ought to recover his damages without specifying their amount; for, as there has been no trial by jury in the case, the amount of damages is not yet ascertained" (*Bouvier's Law Dict.* 678, sec. 25).

II. Even if the decisions allowed defendants to make this motion under sec. 268, they are too late in making the motion. For, 1. In analogy to all the practice on motions for a new trial under the Code, and well settled before the Code, motions for a new trial on a case could only be made before entry of judgment. 2. A stay should have been obtained in which to make the motion in this action, if the defendants desired to preserve their rights under the practice. 3. Or after judgment, the defendants' only remedy was by appeal.

III. 1. As to the judgment and transcript not showing a judgment against the three defendants: (a) The complaint shows that the three defendants were co-partners. (b) The *postea* or judgment entered by default was made and entered by the clerk of the court in point of law. And no detriment should come to plaintiff from the clerk's omission. (c) The execution was issued against the three defendants regularly. (d) And by an order of the court the judgment and transcripts in the original action were amended on

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April 16, 1875, and made to conform to the facts, and to agree with the execution. And during the trial of this cause, and on April 19, 1875, the judgment and transcripts, as amended, were admitted in evidence. This was perfectly proper and regular, and in the discretion of the court under sec. 173 of the Code (*Walsh v. Kelly*, 27 *How.* 359; S. C., affirmed, 40 *N. Y.* 556). So that the judgment is against the three defendants, Joseph Morton, Leon Weil, and Alphonse Weil, from its entry, July 14, 1874. 2. The execution was issued against the three defendants, and the judgment and transcript are against the same.

BY THE COURT.—CURTIS, J.—The relief sought in this action is the same that was prayed for in the case of *Haddon v. Spader* (20 *Johns.* 554). It was to establish and declare the great principle decided in that case by the court for the correction of errors, the chancellor says, in *Gleason v. Gage* (7 *Paige*, 123), that led the revisers and the legislature to establish the statutory provisions upon the subject of creditor's bills. The statute thus enacted (2 *R. S.* 174, secs. 38 and 39), is unrepealed, except that portion that authorizes a discovery, and the remedy remains as before (*Dunham v. Nicholson*, 2 *Sandf.* 636).

The plaintiff, to sustain the present action, must show that previous to its commencement, he had complied with the requirements of the statute, both by a recovery of a judgment against the debtors, and by the exhaustion of the remedy against their tangible property through the return of an execution against them unsatisfied. The courts have unswervingly held the creditor, who sues for relief as a judgment creditor, to a strict observance of each of these pre-requisites. It has been the wise policy of the administration of justice, that the remedy at law should be exhausted before equity could be resorted to.

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Have these statutory requisites been complied with by the plaintiff? It appeared during the trial of this action, that Leon Weil, one of the three defendants sued as judgment debtors, and composing the firm of Weil Brothers & Company, and whose assets the plaintiff seeks to reach, had not been served with process in the original suit, nor had the judgment been entered against him, as alleged in the complaint, and put in issue by the answer. The statute was apparently complied with by the issue and return unsatisfied of an execution not specially endorsed, and in which his name is mentioned as one of the three judgment debtors. It was obvious that the requirements of the statute to sustain the suit had not been complied with, and after the plaintiff rested, the case was re-opened, on the application of the plaintiff, and an order was made directing the amendment *nunc pro tunc* of the judgment and docket in the original action, by adding the name of the defendant *Leon Weil* as one of the parties against whom judgment was rendered.

This amendment, even if within the power of the court, which need not now be decided, fails to give that force and vitality to the judgment and execution which the framers of the statute must have contemplated as a preliminary to the creditor's suit. The amendment did not validate the issuing and return of an execution against the defendant Leon Weil, who had not been served with process, and against whom no judgment existed to sustain the execution. Neither could the amendment make this execution enforceable or valid against the joint property of the three debtors, after it had been issued and returned unsatisfied, upon a judgment that did not authorize it.

If a creditor's suit can be, by amendment, made effectual against a defendant who was not a judgment debtor at its commencement, and against co-defendants who are judgment debtors, without having had the full

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remedy at law exhausted against them, then this form of action must be sustained on some other basis than that upon which the courts have heretofore administered it (*Child v. Brace*, 4 *Paige*, 309).

The amendment can not make that a full execution of the judgment which was not so before, and the most that it can do is to place the plaintiff in a position where he may be enabled at law to duly execute it (*Farnham v. Hildreth*, 32 *Barb.* 277).

The plaintiff objects that this is not a case within the provisions of section 268 of the Code, and that the defendant is not entitled, at the present stage of the action, to obtain a review, at the general term, of the findings and rulings on the trial by a motion for a new trial. Section 268 provides that when the decision filed under section 267 does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term upon a case or exceptions. The decision filed under section 267, in the present case, specifically directs further proceedings before a referee, among other things an accounting before him, and then provides how either party may review his report preliminarily to confirmation, and, after directing the residue of the fund, if any, to abide the further order of the court thereupon, expressly authorizes any of the parties to "apply to the court for such other or further judgment or decree as may be just." This seems to bring the case precisely under the salutary provision of the Code which was intended to relieve litigants from the labor, delay, and expense of this class of proceedings before a referee, which previously had to be incurred, and the judgment made complete and final, before a review could be obtained at general term upon some question, which, if it could have been presented after the filing of the decision, under section 267, would have saved the parties from this useless

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burden. Where the rights of the parties to suits in equity are determined upon the hearing, but a complete disposition of the case requires accounts to be settled, this has always been done, both under the former practice and under the Code, by an interlocutory decree or judgment, as in the present case, declaring such rights and the manner of the accounting, and directing a reference to a master or referee. The proceedings before the latter, and the confirmation of the report, have always been considered as steps necessary and preliminary to authorizing a final judgment, unless the court saw fit to go on and take the accounting necessary to a final judgment after passing upon the rights of the parties (*Mundorff v. Mundorff*, 1 *Hun*, 42; *Kane v. Whittick*, 8 *Wend.* 242; *Bolles v. Duff*, 38 *How. Pr.* 505; *Stanton v. Miller*, 65 *Barb.* 58; *Church v. Kidd*, 3 *Hun*, 254).

The plaintiff also objects, that even if the defendants have the right to make this motion, they are too late, and that they should have procured a stay, and made the motion before the entry of judgment, if they desired to preserve their rights under the practice. Whatever views may have been held in regard to entertaining motions for a new trial after judgment, it is now settled that the court has power under the act of 1832 (*Laws of 1832*, p. 188, chap. 128) to grant a new trial on motion even after judgment (*Raphaelsky v. Lynch*, 12 *Abb. N. S.* 224; *Folger v. Fitzhugh*, 41 *N. Y.* 228; *Tracy v. Altmyer*, 46 *Id.* 598).

If the conclusions arrived at that the plaintiff failed to present a case entitling him to relief, and that the defendants are right in their mode of moving for a new trial, then no occasion arises for considering the other questions presented on the argument, and the defendant's motion for a new trial should be granted with costs to the defendant to abide the event.

MONELL, Ch. J., concurred.

VIII.—22.

Statement of the Case.

HENRY WHITMAN, PLAINTIFF AND RESPONDENT,
v. WILLIAM C. CONNER, SHERIFF, ETC., DE-
FENDANT AND APPELLANT.

I. LEX-LOCI AND LEX-FORI.

1. USURY.

(1). A contract or obligation *valid* by the law of the state where it was made and was to be performed, *can not*, when sought to be enforced in another state, *be held invalid* as contravening the usury law of that state.

(a) The fact that such contract or obligation is *secured by a chattel mortgage* executed in the state where the contract or obligation was thus made and to be performed, upon property in such other state, *does not alter the rule*.

(2) *Security for such contract or obligation upon property in such other state, not invalid.*

(a) As the principal debt is not invalid, although usurious according to the laws of such other state, *so the security therefor is not invalid*, notwithstanding it is on property in such other state, and the party holding it is obliged to come in to the courts of such other state to enforce it.

(b) So held where one basing his right on such security brings an action to recover the possession of the property from the sheriff who had taken it under an execution against a third person.

2. TRANSFERS OF PERSONAL PROPERTY, WHAT LAW GOVERNS.

The law of the state in which the property is at the time of the transfer as to the steps necessary to be taken to give it validity as against creditors or subsequent purchasers or encumbrancers, governs when the transfer is relied on in the *courts of that state* as the basis of an action or a defense, although the transfer may have been *executed in another state*, and for the purpose of securing an obligation made and to be performed in such other state.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

In this action there was a verdict rendered for the

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plaintiff. The court directed the exceptions to be heard in the first instance at the general term.

The suit was upon a claim for the delivery of personal property.

The property in question, which consisted of horses and coaches belonging to a livery stable in Eleventh street, was levied upon by the sheriff, defendant, about December 26, 1874, under an execution against Sterry Fry. The judgment upon which the execution was obtained was for feed sold to Sterry Fry, the proprietor of the stable, between January 24 and July 6, 1874.

On December 1, 1874, the plaintiff, who did business at Providence, in the state of Rhode Island, under the name of Henry Whitman & Co., was the holder and owner of a chattel mortgage, executed to him at Providence, November 17, 1873, by one Sterry Fry, of New York, to secure a then present indebtedness of one thousand four hundred and forty-one dollars and sixty cents; also all sums which should thereafter become due for advances, endorsements, or guarantees to the amount of forty thousand dollars, upon certain horses, harnesses, robes, carriages, &c., then in the city of New York.

The mortgage was filed in the office of the register of the city and county of New York, November 18, 1873, and was, with proof of filing, received and read in evidence upon the trial of the action. A copy of the mortgage, with a statement of the plaintiff's interest, was filed in renewal of the mortgage in the office of the Register, November 12, 1874.

At the time of the renewal, there was claimed to be due and owing upon the mortgage between thirty-three and thirty-four thousand dollars, and a detailed statement of the account for the alleged advances and endorsements made by plaintiff to Fry, under the security of the mortgage, was put in evidence. The amount due upon the mortgage was demanded by plaintiff from Fry, in the fall of 1874, both

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previous to and after the renewal. No part of the mortgage was paid.

All of the transactions, upon the security of the mortgage, between the plaintiff and Fry took place at Providence.

Fry having made default in the payment of the mortgage, the plaintiff took possession of the mortgaged property thereunder prior to December 5, 1874.

A portion of the property embraced in the mortgage was the property in controversy, and which was about December 26, 1874, levied upon and taken and sold by the defendant, under the execution issued upon the judgment against Fry, which was for one thousand six hundred and twenty-four dollars and ninety-seven cents. A demand for the property was duly made upon the defendant. The value of the property taken and sold was claimed to be two thousand six hundred dollars. The defendant read in evidence the judgment roll in the action above referred to, the execution thereon, issued December 1, 1874, the statutes of Rhode Island as to the rate of interest, and the case of *Pierce v. Hennessy* (10 R. I. 223). The Rhode Island statute regulating the rate of interest is as follows:

Section 1.—Interest in the rendition of judgments, and in all business transactions where interest is secured or paid, shall be computed at the rate of six dollars on a hundred dollars for one year, unless a different rate is expressly stipulated (chapter 128, General Laws of Rhode Island, ed. 1872, sec. 1).

At the close of the proofs, the defendant's counsel moved to dismiss the complaint on the grounds:

First. That plaintiff, by his evidence, has failed to establish any cause of action against the defendant;

Second. That the amount set forth in the statement upon the re-filing of the mortgage, as due from Sterry Fry to the plaintiff, is fictitious, and that it is made up largely of an illegal amount of interest, and of an

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amount not covered by the mortgage; and that whether the transaction is to be tested by the laws of Rhode Island or of the state of New York, the mortgage is void. The court refused to dismiss the complaint, and the defendant excepted.

The jury rendered a verdict for the plaintiff, assessing the value of the property at two thousand two hundred dollars, and damages for the detention at thirty-three dollars.

The questions argued arose upon the refusal of the court to dismiss the complaint, and defendant's exception thereto.

Vanderpool, Green & Cuming, attorneys, and *A. J. Vanderpool*, of counsel, for appellant, urged:—I. The transaction relied upon as furnishing the foundation for the chattel mortgage was usurious, and the mortgage itself null and void. (1.) The knowingly and voluntarily taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The offense is not condoned by want of intent to violate the statute, or by giving to the transaction another name than that of loan (*Fiedler v. Darin*, 50 *N. Y.* 437). (2.) The defendant here can take advantage of the usury to defeat the mortgage. Any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Thompson v. Van Vechten*, 6 *Bosw.* 373, 27 *N. Y.* 568, 585; *Schroepel v. Corning*, 5 *Denio*, 236; *Carow v. Kelly*, 59 *Barb.* 239; *Dix v. Van Wick*, 2 *Hill*, 522). (3.) Where any part of a contract is tainted with usury, the whole contract is void (*Matthews v. Coe*, 56 *Barb.* 430; *Cope v. Wheeler*, 41 *N. Y.* 309; *Giblet v. Averill*, 5 *Denio*, 88; *Price v. Lyons*, 33 *Id.* 55; *Jackson v. Packard*, 6 *Wend.* 415; *Fulton Bank v. Benedict*, 1 *Hall*, 480).

II. The transaction is to be governed by the laws of New York, where the subject-matter of the contract

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was situated, where it was to be performed, and where is the forum in which it is sought to be enforced. The plaintiff seeks here to enforce the lien of a chattel mortgage, executed upon property within the state and under the laws of the state. It is in legal effect a sale of property situated in this state, and the presumption is that the transaction is to be carried out here. The mortgage covered leases and fixtures, as well as horses and carriages. It could only be executed here. The entire transaction was one for the purpose of carrying on a business within this state, upon the security of that business, and the plaintiff can not, because of his non-residence, have greater rights than a resident. The law of the place where a contract is to be performed governs as to its construction and validity (*Jewell v. Wright*, 30 *N. Y.*, and cases cited).

III. The statement filed by the plaintiff, in order to renew the mortgage, was fatally defective. The law requires the utmost accuracy, as well as good faith, in the statement which is to be filed. A mere clerical error in the amount is sufficient to defeat the security (*Ely v. Carnley*, 19 *N. Y.* 496 ; *Id.*, 3 *E. D. Smith*, 489). The statement in this case was not the "true statement" demanded by the statute. (1.) It included usurious items of interest. (2.) On a large number of these notes, the plaintiff had not been charged as endorser. A creditor existing or prospective of Fry would be utterly unable to find out how much had actually been advanced by the plaintiff, and how much of the sum mentioned was a contingent liability. (3.) After the assignment by Fry, on July 10, 1874, no lien could be created by him on the property, and it could not be charged with any new debt of his. Notwithstanding this, there are included in this statement advances made by the plaintiff subsequent to the assignment, and prior to the re-filing, and this although the plaintiff was aware of the assignment. (4.) It also includes large

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sums which became due before the mortgage was given, and which are not covered by it. The mortgage by its terms was to cover *future* advances, not *past*.

J. F. Harrison, attorney and of counsel for respondent, urged : The plaintiff's claim under the mortgage was neither fictitious, nor tested by the law governing the place of contract—is any portion of the amount made up of an illegal rate of interest. The law of the place of contract must govern. (a.) The contract was made, and all the transactions between the plaintiff and Fry took place at Providence, in the state of Rhode Island. There is no usury law in that state. The law governing the rate of interest there simply fixes the rate at six per cent., where no agreement is made, but allows an agreement for any rate, and such a contract is enforceable. By the plaintiff's agreement with Fry, made in Rhode Island, he was to charge Fry whatever rate he had to pay. No more than seven per cent. was charged him, unless the plaintiff was obliged to pay more, and seven per cent. was charged by agreement between plaintiff and Fry.

BY THE COURT.—CURTIS, J.—The chattel mortgage in question was given to the plaintiff to secure sundry loans and liabilities. The transactions in reference to these occurred at Providence, Rhode Island, where the plaintiff then and ever since has resided. The chattel mortgage was dated and executed there.

It is claimed that the obligations which the chattel mortgage was given to secure were usurious, and the mortgage consequently void, and that they are governed by the laws of the state of New York.

The statute of Rhode Island directs that interest shall be computed at six per cent., unless a different rate is expressly stipulated. In the transactions secured by the mortgage, where any rate other than six per cent,

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was charged, such rate was so charged by express agreement between the parties. The taking of a greater rate of interest than six per cent. in Rhode Island does not vitiate contracts, nor is it punishable as an offense. This fruitful source of litigation is closed, and even the courts, disregarding all theories of its heinousness, appear impressed with the material idea that thus inviting an influx of capital promotes the public welfare. In a state where such laws and views prevail, it is evident that the plaintiff can not be deprived of debts justly due him, or of realizing upon the securities he may have taken as collateral to them, because he has charged, and the borrower has agreed to pay, the current rates of interest (*Pierce v. Hennessy*, 10 R. I. 223).

But it is urged that the laws of the state of New York govern. Obligations incurred, dated and to be fulfilled in Rhode Island, can not be held usurious and void under the statutes of New York because they are secured by a chattel mortgage executed also in Rhode Island upon chattels that are in New York. The principle recognized in the comity that prevails among all civilized nations, that obligations if valid by the laws of the country where made and to be fulfilled, will be sustained in the country where they are sought to be enforced, even though usurious under the laws of such latter country, was affirmed in *Guillander v. Howell* (35 N. Y. 662).

Though the New York statutes respecting usury can not be successfully invoked against these transactions in Rhode Island, the same doctrine does not apply to those statutes which regulate the filing and renewal of chattel mortgages made there upon personal property in this state.

It is the right of a state in which personal property is conveyed subject to a condition, without a change of possession, to prescribe such mode of recording, and of public notice, as it deems best to protect its own citi-

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zens. This is a duty under such contingencies, that it owes to itself, partaking of the nature of an internal police regulation. Consequently, the party who takes a conveyance of personal property of this nature without taking possession of it, is bound, in order to protect the interest he so acquires, to conform strictly to the local law.

The plaintiff holding this chattel mortgage, executed in Rhode Island upon chattels in New York, in order to protect his lien and interest thereunder, was fully amenable to every provision of the New York statutes respecting the filing, the renewal, and the statement to be filed in order to renew it.

The law requires accuracy and good faith in the statement which is to be filed, in order to protect the security. It is a public notice to all dealers with the mortgagor, and upon which they are entitled to rely in business transactions. When the plaintiff elected to leave these mortgaged chattels in the possession of the mortgagor, he was required to file a true statement of his interest in the property mortgaged.

The statement filed by the plaintiff, November 12, 1874, on the renewal of the mortgage, shows that the amount due on, and his interest in, the mortgaged property was thirty-three thousand four hundred and sixty-one dollars and forty-two cents. The plaintiff testified on the trial that there was this amount due to him at the time of the renewal, and that he had demanded it from the mortgagor. There was other testimony corroborating his statement. On his cross-examination he produced an account showing the details of his statement. It was claimed that this account was obscure and loose, and that there were items that conflicted with his evidence. An examination of these details, presented inartificially and not very clearly, fails to negative the effect of the testimony as to the accuracy of the renewal statement. No testi-

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mony was introduced on the defendant's part. There is nothing to show that the jury found incorrectly upon any question of fact, nor do the exceptions afford ground for setting aside their verdict.

There should be a judgment for plaintiff upon the verdict, with costs.

SEDGWICK, J., concurred.

JOHN RYALL, ADMINISTRATOR, ETC., PLAINTIFF AND
APPELLANT, v. JAMES KENNEDY, DEFENDANT
AND RESPONDENT.

I. VESSELS.

1. NEGLIGENCE OF OFFICERS.

(a) *Steward, what is negligence by.*

1. When, for the purposes of fumigation, under the direction of the health officer, the steward (as is his duty) clears the passengers from the steerage, and furnishes the health officers with the drinking vessels of the passengers, in which to put the fumigating compound, being a poisonous substance, and, after the fumigation, orders the passengers back to the steerage without having removed the drinking utensils, or seeing that they are thoroughly cleaned, he knowing the character of the fumigating substance, is guilty of negligence.

(b) *Passenger, what is not contributory negligence.*

1. A mother allowing one of her children, of five years of age, to play about the steerage, in her presence, she not knowing any deleterious substance to be contained in the drinking vessels, is not guilty of contributory negligence.

(a) This although *she had seen* the child take the cup to drink out of it.

(c) *Captain of merchant vessel, liability of.*

1. He is personally liable for injuries caused by the negligence of his subordinates *during the voyage*, among them the steward.

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(a) *Public armed vessels.* The position of the captain of a public armed vessel is different from that of the captain of a merchant vessel.

(d) *Voyage, when not ended.*

1. Not until the vessel is *moored* at her point of destination. The master's liability continues until then.

(a) *Health officer, visit of does not relieve the master.*

1. It does not divest him of his general power and control.

II. DEATH.

1. ACTION FOR DAMAGES FOR DEATH CAUSED BY NEGLIGENCE.

(a) *What not necessary to maintain*

1. Special pecuniary damage is not.

(b) *By whom to be brought.*

1. Only by a representative of the deceased appointed by a court having jurisdiction.

III. DOMICIL AND HABITATION.

1. INFANT.

(a) Its domicil and habitation *follows that of its father*, and after the death of the father, that of its mother, in the absence of fraud, until her re-marriage.

2. WHAT SUFFICIENT TO CONSTITUTE A DOMICIL OR HABITATION.

(a) *Prima facie evidence.* Being at a place is *prima facie* evidence of a domicil.

(b) Where one came to the city of New York as an emigrant, and resided there for seven months, when he was joined by his wife and children, except one which died on the voyage, and he and his family continuously resided in the city of New York for five years,

Held,

that he was an inhabitant of the city of New York at the time of the death of the child which died on the voyage, the *prima facie* evidence not having been in any way refuted.

IV. SURROGATE'S JURISDICTION.

1. *Upon above principles*, the child at the time of its death was an inhabitant of the county of New York, although it had never been within the county. And the *surrogate of New York had jurisdiction* to grant letters of administration on its estate.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from a judgment dismissing the complaint.

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The plaintiff sues as administrator of his son, an infant, aged four years and nine months at the time of his death, to recover, under the statutes of 1847, chap. 450. and 1849, chap. 256, for the pecuniary injuries suffered by the next of kin of the deceased, by reason of his death.

The plaintiff left London, England, in July, 1870, and since the 27th of that month has resided in the city of New York. On March 2, 1871, his wife and his two children, one being the deceased, and the other aged three months, sailed in the steamship City of Brussels, commanded by the defendant, to join him.

Upon March 12, the ship arrived in this port, and, having small-pox on board went to the quarantine anchorage, opposite the quarantine station on Staten Island, about a quarter of a mile from the Staten Island shore west of the main channel. The health officers came on board, and, after clearing the cabins of all the passengers, and ordering them on deck, fumigated the ship. The material used on this occasion to fumigate the ship was a deadly poison, and was distributed around the cabins in basins and in the passengers' pannikins, which are their drinking cups. The health officers, closing the cabins, and leaving instructions as to the length of time they should be kept closed, and as to the removal of the vessels, left the ship, and went on shore. In about an hour after, the head-steward of the ship came and ordered the plaintiff's wife and two children down into the cabin, where, after remaining about half an hour, her little boy, the deceased, came running and crying to her, with a pannikin in his hands, with his tongue protruding from his mouth, thick and white, having drank the contents of the pannikin, which turned out to be some of this deadly poison which had been used to fumigate the ship. The steward came into the cabin and took the pannikin and threw it out of the port-hole, and said. "My God ! it is

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poisoned!" and took the child to the ship's hospital, where he died in about three hours after, from the effects of drinking this deadly poison from a drinking-cup carelessly and negligently left standing in the passenger's cabin.

Letters of administration were granted on the infant's estate by the surrogate of New York county, to the plaintiff.

The defendant was not in any way interested in the steamship, as owner or otherwise, further than being the captain.

Steamships are fumigated in pursuance of statutes of this state.

At the close of the plaintiff's case, a motion was made to dismiss the complaint, which was denied at that stage of the case; but after the testimony of the defendant had been introduced, the motion for judgment and to dismiss the complaint was renewed and granted.

Salter & Cowing, attorneys, and of counsel for appellant, urged:—I. The master of a ship is personally liable to third persons for any damage happening to them by reason of the negligence of himself or his mariners (*Shearman & Redfield on Negligence*, p. 131, sec. 113; *Dennison v. Seymour*, 9 *Wend.* 1; *Schieffelin v. Harvey*, 6 *Johns.* 169; *Foot v. Wiswall*, 14 *Id.* 303; *Abbott on Shipping*, p. 231, and notes on p. 231 and 232; *Watkinson v. Langton*, 8 *Johns.* 213; *Abbott on Shipping*, p. 173, note).

II. The domicile and residence of the deceased, who was living with his parents, was the same as theirs (*Story on Conflict of Laws*, sec. 46; *Sprague v. Lithenbury*, 4 *McLean*, 442). At the time of the death of the plaintiff's child, he, the plaintiff and father of the child, was actually residing in the city of New York, and the mother and her two children were on their

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way to join the father, to make his home their home. The domicil of the child is that of the father, which, in this case was the city and county of New York. (3 *Ohio R.* 101; 4 *Greenleaf R.* 47.) Bouvier's law dictionary and Webster's dictionary both define an inhabitant of a place to be "One who has his domicil in a place, or has a fixed residence in a place." Under the above definitions, the plaintiff, the father, and his infant son, were both inhabitants of the city and county of New York, and the Revised Statutes provide that, "The surrogate of each county shall have power to grant letters of administration of the goods, chattels and effects, where an intestate at or immediately previous to his death, was an inhabitant of his county." Letters may be granted to a foreigner where he resides in this state. The learned justice erred in refusing to allow the plaintiff to prove that the mother came to the city of New York to join her husband, and for the purpose of taking up her abode here.

III. In cases of this kind no proof of pecuniary or special damages is necessary (*Ihl, &c., v. The 42d St. R. R. Co.*, 47 *N. Y.* 320).

IV. There was upon the question of negligence but two questions: 1st. Was the defendant guilty of negligence? 2d. Was the deceased free from negligence? There certainly was abundant evidence in the case to bring the case within the rule that the plaintiff was entitled as matter of right to have these issues submitted to the jury (*Wolfskiel v. Sixth Ave. R. R. Co.*, 38 *N. Y.* 49; No. 11, *New York Weekly Digest* (similar case), p. 225; *Berrhart v. Rensselaer and Saratoga R. R. Co.*, 32 *Barb.* 165; *William v. O'Keefe*, 24 *How.* 116).

V. The plain, uncontradicted, and unimpeached evidence in this case clearly establish facts which not only show that the defendant was negligent, but that the deceased and his mother were both free from negli-

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gence; but even if the inferences to be drawn from the admitted facts would have warranted the jury in coming to a different conclusion upon either of the above propositions, yet in the case of a nonsuit they are both to be decided in favor of the plaintiff (*Cook v. N. Y. Central R. R. Co.*, 42 *N. Y.* 476; *Wolfkiel v. Sixth Ave. R. R. Co.*, 38 *N. Y.* 49).

Platt & Gerard, attorneys, and *James W. Gerard* and *John M. Bowers*, of counsel for respondent, urged:—I. Both the intestate and his parents had always, previously to the time of the accident, been inhabitants of England, and though his father had come to the United States before the mother and child, he had not so much as declared his intention of becoming a citizen at the time of the death of his child. There is nothing in the case to show that the father, at the time of the child's death, *i.e.*, seven months after the father's arrival, intended to be either a citizen or an inhabitant of this state. The recital of a necessary fact to confer jurisdiction in the letters of administration, *viz.*, being, at or immediately previous to his death, an inhabitant of the county of New York, is absolutely negatived by the proof, as above set forth (*People v. Corlies*, 1 *Sandf.* 228; *Same v. Barnes*, 12 *Wend.* 492; *Corwin v. Merritt*, 3 *Barb.* 341; *Paff v. Kinney*, 1 *Bradf.* 1; *Sheldon v. Wright*, 5 *N. Y.* 497). The surrogate of New York county having, therefore, no power to issue letters to the plaintiff, on the estate of the intestate, this action can not be maintained by the plaintiff. The question of the right of a surrogate to issue letters can be raised in a collateral action, and it was proper to raise it at the trial of this action (*Duchess of Kingston's Case*, 2 *Smith's Leading Cases*, 689, and cases cited; *Bolton v. Jacks*, 6 *Robt.* 166; *Kentz v. McNeil*, 1 *Den.* 436).

II. No negligence was proved against the steward

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or any of the employees of the vessel. There is nothing in the case to show that it was part of the duty of the steward or any one else on the steamship to take away the vessels used by the health officers after the fumigation; if such work was done by any of them it was done under the direction of the health officers, in pursuance of the authority given them by the above acts, and as their representative. The performance of such work by any of the employees of the vessel was not brought home to the knowledge of the captain; it was not done with his consent or by his authority, and was not any part of the regular duties of any of the employees of such vessel—certainly not a duty with which the captain could be considered to be in any way connected.

III. In the absence of any decision holding the captain of a vessel liable in such a case as this, the general rule that an agent, manager, or servant, is not answerable for the negligence even of those whom he has retained for the service of his employers, must apply. In such cases the action must be brought against the hand committing the injury, or against the principal for whom the act is done or not done (*Dunlaps's Paley's Agency*, chap. 6, sec. 2, p. 402; *City of Buffalo v. Holloway*, 7 N. Y. 493; and cases cited). That the master of a vessel is not liable for damage done by a subordinate officer for running down another vessel during the watch of the sub-officer, see *Nicholson v. Mounsey*, 15 East, 382. To the same effect is the case of *Blakie v. Stembridge* (6 Com. Bench R., J. Scott, 893), holding that the master is not liable for injuries resulting to the packing of a cargo through the negligence of a stevedore in stowing the same, even if the master is watching the work, the stevedore not being the servant or agent of the master, so as to render him responsible. Although by the maritime law masters of vessels have been held liable in many cases

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for the acts of their sub-employees, yet this exception to the general rule, as to the non-liability of agents to third persons, has been established solely on the principle that the master had supreme control of all on board the vessel. In this case, however, his authority and control of his ship had been taken away by statute, and for the time being he was without control over his steamer, and both himself and his passengers and crew were subject to the authority and directions of the health officers (*Laws of 1850*, chap. 275). The defendant is not the superior in this case, the steward having been employed by the owners.

IV. In any event, the child and its mother were guilty of contributory negligence. The mother says the child was so young that she would not let it go out of her sight, and that she never let him run away from her side. How did it happen, unless she forgot that he needed the care she describes, that he was running about behind her in the steerage and rooms, so that she could not tell where he got the pannikin from? drinking what he pleased from the numerous dishes and pannikins lying about, either on the steerage table or in the various berths and state rooms which it was no part of the steward's business to explore? This testimony of the mother would seem to bring the case within the well-known provision of law, that where the negligence of the party injured in any manner, or to any extent, contributes to the production of the injury, however slightly, and without such fault on his part it could not have occurred, there can be no recovery (*Redfield on Carriers*, sec. 528, Edit; and cases cited; *Wilcox v. Rome, Watertown & Ogdensburg R. R. Co.*, 39 *N. Y.* 358; and cases cited). And no matter how gross or evident the negligence on the part of the other party, the same rule applies (*Mangan v. Brooklyn City R. R. Co.*, 36 *Barb.* 237). And that the negligent acts of the parents or custodian of a child, in

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reference to the care of such child, prevent a recovery, in case of his death or injury, through the negligence of other parties, to the same extent as if he were an adult, and guilty of contributory negligence (See *Wharton on Negligence*, sec. 311, note, and cases cited; *Burke v. Broadway and Seventh Ave. R. R. Co.* 44 *Barb.* 529; *Flynn v. Hatton*, 4 *Daly*, 552).

BY THE COURT.—CURTIS, J.—The defendant testifies that he was the master of the vessel, and that his interest in her was to navigate her safely, and look after the safety of the passengers. The law imposes these duties upon him, and the duties of the stewards are, as his subordinates, to care for the comfort, nourishment, and welfare of the passengers. It is their immediate office to attend to the wholesomeness and cleanliness of the quarters, and of the food and of the dishes in which it is served to the passengers. It is objected that the nature of the steward's duties is not in proof, but it sufficiently appears in the case, that it was precisely these duties which were entrusted to the steward, and which he undertook to perform.

The health officer testifies to the care that was taken in conducting the fumigation. He says "this involved that the steward should clear the passengers from the steerage, and keep them from this dangerous substance." "The utensils in which to pour the poison were furnished by the steward." Again, he says, "I recollect having a conversation with the steward, Cæsar, on that occasion, and on this matter; I have heard of accidents before from this poison having been drunk by children on steamships; it was since this one on the National Line. There was also a case occurred in the city, I think. I have heard of cases a number of times occurring from this fumigation."

It was the obvious duty of the steward conversant as he was with the dangers attending this fumigation,

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to have seen that the vessels supplied by him, and used in it, were removed from the cabin before he ordered the passengers to return there, especially as many of the passengers were of very tender years. The exclamation he made, and what he did, when the mother called his attention to the child just after it drank from the pannikin, revealed a knowledge of the danger and a consciousness that his not having removed it before, contributed to it. It appears that neglect on his part was fully established by the evidence.

The defendant insists, that in any event the child and its mother were guilty of contributory negligence. To determine that, it is necessary to refer to the testimony. The mother, who alone of those who were present at the occurrence was examined as a witness, testifies: "When I first went down, the steward came and served us with soup for our dinner; I was then sitting at the table, and my little boy sat down and took some soup with me, and then I sat down by the table in the steerage, and nursed the baby." "My little boy was playing at the back of me with some more children." "He was playing there a good while, and was laughing quite hearty; I was nursing the baby, and did not notice the little boy for a good while. I would not let him away from my sight; he did not run up and down the steerage except while I was sitting there." "He would run around the table; sometimes my back would be towards him. I had been down stairs about half an hour, when my little boy came running to me; he did not come from one of the berths, he was standing behind me, playing." "The panniken was on a seat by the dining-table in the steerage, where he was playing. I was sitting at the corner, and he was playing behind me, and the pannikin was on the other side. When I looked around, that is where he was standing, taking the pannikin down from his mouth. He cried, and I looked around,

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and he was just taking the pannikin down from his mouth."

So far from there being any negligence on the part of the mother, she seems to have devoted herself wholly to the care of her children. This child, nearly five years of age, was in her company at the time, playing, as was natural and proper just about her, in the cabin, where the mother had reason to consider everything safe, and the place in the vessel where the child was the least exposed to danger.

The mother was ignorant of the contents of the pannikin; it was an ordinary tin drinking cup, and if she had seen the child take it to drink from it, as was perfectly natural and proper for the child, there is no reason to think she would have prevented the child from doing so. No contributory negligence is shown on the part of the mother, and for aught that appears in the case, the most cautious adult might have been poisoned as the child was, by this act of cruel negligence on the part of the steward. The carrier who undertakes to transport passengers of tender years, owes a duty to them, in view of their inexperience and infancy, to protect them the more carefully from danger. There was no contributory negligence shown on the part of the child.

A question is raised as to whether the master of a ship is personally liable for damages to third persons, by reason of the negligence of himself or those under him on board the ship. The master testifies that he did not employ the steward, but that he was employed by the owners in Liverpool. From the very nature of his position and responsibility as master of the ship, and as this very designation of his position implies, all persons employed on board, whether by the owners or by him, are his subordinates. For wise reasons of public policy, the master is responsible as well as the owners for every injury that might have been pre-

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vented by human foresight and care. When the owners are unknown, or reside in a foreign country, the injured party is not obliged to search for them, but he has his remedy against the master personally, who is responsible for his own negligence, and also for that of every one of his subordinates. In consequence of this very responsibility, the law clothes the master with power to require and compel strict obedience to his orders.

It is no answer for him to show that his subordinates are employed by the owners and not by him. He knows the responsibility of his position, and if he is not content to acquiesce in the employment of those under him by the owners, and to incur responsibility for their negligence, then he should not accept the post, or should retire from it. His position differs from that of the captain of a public armed vessel, who has no choice as to where he shall serve, but obeys the orders of his superiors, and is obliged to take the command, though he has no voice in the appointment of any one under him, and has, perhaps, grave reasons to distrust them. (*Denison v. Seymour* 9 *Wend.* 15 and 16; *Schiefflin v. Harvey* 6 *Johns.* 177; *Watkinson v. Laughlen*, 8 *Id.* 167; *Foot v. Wiswall*, 14 *Id.* 307.)

The defendant's objections that the voyage was ended, and also that he had no authority on board of the ship at the time, as she was in the charge of the health officer, seem to be met by the testimony of the health officer. The latter testified that as soon as the mixture is made below, the gas is generated, and that he and his men come up and leave, as they have nothing else to do, and no further authority, and that usually when there is no disease on board, the anchor is frequently up by this time, and the ship is left to proceed towards New York at once, while the fumigation is going on.

The voyage can not be considered as terminated until the vessel is moored at her point of destination,

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and this brief visit from the health officers of the port, and delay, does not divest the master of his general authority and control over the vessel, and which he is bound to exercise for the purpose of facilitating this very act. The fumigation of the vessel, and the removing of the sick person to the quarantine hospital, deprived him of no authority to compel the steward, who furnishes the utensils to the health officers to pour the mixture into, to take proper care of them, after he had left, and especially when the passengers were required to descend to the cabin in which they had been used. It might as well be claimed that the boarding and presence of custom house-officers to prevent smuggling, or the enforcement of any police law or regulation, deprived the master of his authority and responsibility.

The absence of proof of special pecuniary damage to the next of kin from the death of the child, would not have justified the court in dismissing the complaint. (*Ihl v. The Forty-second St. R. R. Co.*, 47 *N. Y.* 32).

It is contended that the plaintiff can not maintain this action in his representative capacity, as the surrogate of the county of New York had no power to issue the letters of administration.

The act under which this action is brought, Chap. 450, *Session Laws of 1847*, provides that whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, for which the person injured could have maintained an action for damages if death had not ensued, then such action may be brought by and in the name of the personal representative of the deceased.

Consequently, this action can only be brought in the name of a representative appointed by a court having jurisdiction.

The surrogate of the county of New York has

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jurisdiction by statute (2 R. S. 73,) to issue letters of administration, among other cases, in the following: "Where an intestate, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened." "Where an intestate, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein."

Residence and domicile generally mean the same thing. An inhabitant is defined to be one who has his domicil in a place (*Crawford v. Wilson*, 4 Barb. 520). The term "inhabitant" as used in the Revised Statutes is to be construed in harmony with the law of domicil (*Isham v. Gibbons*, 1 Brad. R. 93). Was the intestate an inhabitant of the county of New York at the time of his decease?

The domicil of an infant follows that of its father. If the father dies, it follows, in the absence of fraud, that of its mother, until such time as the mother re-marries, when by reason of her own domicil becoming subordinate to that of her husband, that of the infant ceases to follow any further change by the mother, or, in other words, it does not follow that of its stepfather (*Brown v. Lynch*, 2 Brad. R. 218; 2 Kent Com. 228 and 431; *Potinger v. Wightman*, 3 Merivdles R. 67; *Somerville v. Somerville*, 5 Vesey, 759; *Inhabitants of Comnor v. Nulton*, 2 Salkeld, 528; *Andrews v. Herrot*, note 2, 4 Cow. 516. *Story Conflict of Laws*, § 46).

This rule as to the infant's domicil, derived from the civil law, seems for a long period to have been recognized in the common-law courts. It was held, all the judges concurring, that where a father gains a second settlement after the birth of his child, that settlement is immediately communicated to the child, and children must be sent to their father's settlement though never there before (*Reading v. Eversley*, 2 Session Cases, 116, temp. Geo. 1).

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The domicil of the intestate was that of the father. He came to New York as an emigrant, seven months before the death of the child. His wife and children left his former domicil, and came here to join him. From the time of his arrival, July 27, 1870, he has resided in this city continuously up to the time of the trial, June 15th, 1875. His answer that he came here for the purpose of living here, and making it his home, was struck out by the court at the trial.

But the case discloses that he had established a domicil in New York. In *Heidenbach v. Schland* (10 *How. Pr. R.* 477), it was held, that a person, an emigrant, having left for ever his native land, and living in this state without any determination to reside elsewhere, is a resident here. In Lord Thurlow's definition, in note (*Marsh v. Hutchinson*, 2 *Bosanquet & Puller*, 230), he uses this language: "A person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence." "It may be rebutted no doubt;" and then he states what may be shown in rebuttal, as his being in the place for health, business, or travelling, or by military orders, or in a diplomatic capacity.

In the present case there is nothing proved in rebuttal of the plaintiff's testimony as to his residence here.

The intestate must have had a domicil, and he could have but one domicil, and being an infant, the law made his domicil that of the father, which was in the county where the letters of administration issued (*Crawford v. Wilson*, 4 *Barb.* 519).

Even if the jurisdiction of the surrogate can be thus collaterally impeached, as the defendant claims, it can only be upon evidence plainly disproving the recitals in the letters of administration, and it is not to be arrived at by inferences or forced interpretations.

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In *Shelden v. Wright* (5 *N. Y.* 497), it was held, that where certain facts were requisite to give the surrogate jurisdiction, and it appeared from the record that there was evidence tending to prove such facts, and that such evidence was adjudged to be sufficient, then that such judgment could not be collaterally impeached or contradicted. .

The injury and death of the intestate is not claimed by the plaintiff to have occurred within the limits of the county of New York, though the statement of the mother that it was in sight of Castle Garden, and near the shore, is incongruous with her statement that it was in the quarantine. It may have occurred within the southern limits of the city, as established by the ancient grants from the crown, and which, confirmed by subsequent constitutional guarantees, are not affected by legislative enactments. If it occurred south of these limits, upon waters in the counties of Kings or Richmond, then it occurred where the county of New York possesses, for some purposes, a concurrent jurisdiction with those counties (*Laws* 1824, p. 359, § 2). But if the views heretofore expressed are correct, a consideration of any other questions for the disposition of the case becomes unnecessary.

The case upon the evidence might properly have gone to the jury.

The judgment should be reversed, and a new trial ordered, with costs to abide events.

SEDGWICK, J., concurred.

Statement of the Case.

MARGARET C. KENYON, PLAINTIFF AND RESPONDENT, v. AUSTIN SHERMAN, *et al.*, DEFENDANTS AND APPELLANTS.

I. SEVERAL VERDICTS.

1. RIGHT OF ONE OF A NUMBER OF DEFENDANTS TO A CHARGE THAT THE JURY MAY RENDER.

(a) *In an action of tort* against a number of defendants, when the evidence is such as would uphold a verdict in favor of one or more, although rendered against the others, each of the defendants in whose favor a verdict might have been rendered, is entitled to a charge to the jury that they might find in favor of one or more of the defendants, even if they did not find in favor of all.

1. *Refusal so to charge, error which is cause for reversal.*

(1) PRIVILEGE. It is the privilege of each defendant to *have his case passed on* by a jury having full knowledge that they could find in his favor, and against each of the other defendants.

(a) This although *all* the defendants *join* in the same answer, and set up the same defenses.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal by the defendants from a judgment in the plaintiff's favor, and also from an order denying a motion for a new trial.

The suit is for the conversion of plaintiff's furniture, household goods, and wearing apparel.

The plaintiff, previous to January 3, 1874, had occupied No. 22 W. Ninth street as the tenant of the defendant Sarah Ludlow, her sister. The defendants Austin Sherman and William D. Ludlow were respectively father and husband of the defendant Sarah Ludlow, who was the adopted daughter of the former,

Appellant's points.

and acted as her agents in the dispossessing proceedings, and the execution of the warrant. Springstein, another defendant, was an officer attached to the Third Judicial District, New York city. On January 3, 1874, the plaintiff was ejected from the premises for the non-payment of rent. The proceedings for this were taken by the defendant Mrs. Ludlow.

The warrant of dispossession was executed by Springstein, aided by the co-defendants William D. Ludlow and Sherman, who stated that they were acting for Mrs. Ludlow.

These defendants not only dispossessed the plaintiff, but they refused to permit her to remove, and actually prevented her from removing, what she claimed as her property from the premises. Springstein, Sherman, and William D. Ludlow interfered with the plaintiff when she attempted to remove such property; Mrs. Ludlow was not present.

The answer was a general denial; also that the property actually detained belonged to the defendant Austin Sherman.

There was a verdict for the plaintiff against all of the defendants. From the judgment entered upon such verdict, and from the order denying defendants' motion for a new trial, the present appeals are taken.

W. B. Putney, attorney, and of counsel for appellant, urged, as to the point decided by the court: There was different testimony as to what the several defendants did in the transaction—it was a question of fact for the jury to determine whether any property of plaintiff had been seized and converted, and if so what, and by whom, and if any one of the defendants had been found by the jury to have had no participation in the matter, then the verdict should have been in the favor of such defendant. The refusal to charge as requested was error, and the exception taken is well taken.

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George Chalmers, attorney, and *Edward D. McCarthy*, of counsel for respondent, urged on the point decided by the court: The court refused to hold that the jury might find for one if they did not find for all. Undoubtedly if the facts had been such that Mrs. Ludlow could have made any other case than the other defendants, if her answer and proof had pleaded and shown such a difference, then this request would have been right, and the refusal to charge it error. But here all the defendants make one and the same defense. The evidence does not discriminate one defendant from the others. If Sherman did not own all the property appropriated, then all the defendants became liable; if he did, no one was liable. On this evidence the jury could not have found for one and against the other defendants.

BY THE COURT.—CURTIS, J.—This action was brought against the defendants, to recover damages for the conversion of the plaintiff's property. The jury found a verdict for the plaintiff against all of the defendants. As to the defendant Mrs. Sarah Ludlow, there was conflicting evidence. It was claimed by the plaintiff that the evidence showed that she authorized and connived at the withholding by the other three defendants of the plaintiff's furniture, and also of her wearing apparel, and that of her infant children's. Also that these acts of the three other defendants were not only authorized by her originally, but that she thereafter ratified and adopted them, by having the chattels that were so withheld and converted conveyed to her own premises, and there in part stored, and a part retained and rented with the house.

The defendant, Mrs. Sarah Ludlow, in her own testimony, denies that she ever authorized or instructed any one to take possession or detain this property of the plaintiff's. There was evidence at the trial corrob-

orating Mrs. Ludlow's claim, that her only action in the matter was, as owner of the house where the plaintiff lived, to have her dispossessed, and that she had nothing to do with the conversion of the furniture and other personal property of the plaintiff, and that its being placed on her premises was not her act, but was done to preserve it for the plaintiff, who is her sister.

The proofs at the trial indicated that a harsh and oppressive course had been taken by the other defendants, not only in prematurely executing the warrant of dispossession, but in using it as a means to deprive the plaintiff of her furniture, household goods, and wearing apparel, and to get the possession of it themselves. There were circumstances disclosed at the trial that probably tended to impair the credibility of some of the evidence introduced by the defendants. It was a case where the sympathies of the jury would readily be stirred in behalf of the plaintiff. Still it was a case where, if the evidence was such that the defendant Mrs. Ludlow might have been acquitted by a verdict in her favor, she was entitled not to be prejudiced by any direction from the court in that behalf.

There seems to be enough shown by the testimony to warrant the jury in so acquitting her, if they gave it credence. After the close of the charge, the counsel for the defendants asked the court to charge the jury that they might find in favor of one or more of the defendants, even if they did not find in favor of all. The court declined so to charge, and the defendants' counsel excepted.

This might properly have been charged, as matter of law. The Code, § 274, provides that judgment may be for or against any of the parties. In actions of tort a several judgment can be rendered against some of the defendants, and the others be acquitted (Wagner

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v. Bill, 19 *Barb.* 325 ; Montfort v. Hughes, 3 *E. D. Smith*, 594).

The defendant Mrs. Ludlow, and possibly other defendants, may have been prejudiced by this instruction being withheld from the jury. The latter may have thought that they could not consider the case of any one defendant separately from that of the others, and that it was not in their power to find a verdict for any one defendant. That they had this right, should have been made clear to them, as from the court declining so to charge them, they would possibly consider that they were without such right. It was the privilege of each of the defendants to have his case passed upon by a jury, having full knowledge that they could find in his favor, and against each of the other defendants.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

SEDGWICK, J., concurred.

Statement of the Case.

JACOB COHEN, PLAINTIFF, v. DRY DOCK, EAST
BROADWAY, AND BATTERY RAILROAD
COMPANY, DEFENDANT.

Collision Case.

I. NEGLIGENCE OR WILLFULNESS.

1. The plaintiff, driving a light vehicle, was obstructed in crossing the track of a horse-car railroad by a blockade of trucks, so that he was obliged to stop with the rear part of his hind-wheels on the track, and while in this position, a car approached, the driver of which, after waiting a moment or two, told the plaintiff to "get off the track," and the plaintiff asked him to wait until the trucks moved; promising then to move, whereupon the car-driver said, "Damn you! if you don't get off here; I am late; I will get you off some way or other;" to which the plaintiff replied, "You, wait a moment; I guess the trucks are moving, and I may go." The trucks started, and as the plaintiff prepared to move on, the driver of the car started his horses, and the platform of the car hit or touched the hind wheel of the plaintiff's vehicle, and overturned it, and caused the personal injuries to the plaintiff complained of.

HELD,

1. *A willful act* was not necessarily established by the evidence.
 - (a) The car-driver may have attempted to pass either without hitting the vehicle or by shoving it around out of his way and the hitting, or the force of the blow may have been *an error of judgment, in measuring the distance.*
 - (1.) The *language* used by the driver does *not necessarily indicate* willfulness and malice.
 - (a) DISMISSAL OF THE COMPLAINT HELD ERROR.
- (2.) *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122, distinguished.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Plaintiff's points.

Exceptions heard at general term.

The action is to recover damages for personal injuries alleged to have been sustained by reason of the negligence of defendant's servant. The facts as to the injury are stated in the opinion. At the trial the court dismissed the complaint, to which the plaintiff's counsel excepted. The court directed the exception to be heard in the first instance at the general term, and suspended judgment in the meantime.

The facts are stated in the opinion.

Julius Lipman, attorney, and of counsel for plaintiff, urged: I. The car driver's act came within the scope of his employment. What is the scope of the driver's employment? Why, to drive the car—only that and nothing more, and if he drives it unskillfully, and even maliciously, the plaintiff submits it is "within the scope of his employment."

II. In this case the driver did not intentionally or willfully commit the injury. The testimony shows that he stopped his car within a safe distance of the buggy, and shouted to the plaintiff to get off the track. The plaintiff said he would so soon as the wagons moved. After waiting a little, the driver got impatient, shouted he was "late," and swore a little. Then the trucks began to move, and the driver let go the brake and drove on. The presumption and fair inference is that the driver thought the wheels of the buggy would be sufficiently off the track when the car reached it to pass clear, but made a miscalculation. In this view the act was neither willful nor unlawful, but was within the fair scope of his authority. He had the full command and charge of the car and horses. He had the command and management of them for a lawful purpose. Was responsible to the defendants for his acts, and again he labored under the responsibility

Plaintiff's points.

to the defendants if he did not reach the termination of his route within the prescribed time. He was not engaged in any unlawful act or employment, and the occurrence took place in the course of that employment, and arose out of it. The plaintiff was not a passenger in the defendant's car. He was using the public highway.

III. Railway companies must run their trains with reference to persons who may be rightfully upon the streets used by their roads (Kansas Pacific R. R. Co. v. Pointer, 9 *Raus C.* 20 ; 1872). "Exemplary damages may be awarded against a railway company for an injury occurring through the gross negligence or drunkenness of its servants" (Peale v. Railroad Co., Dillon [*U. S. Cir. Ct.*] 568 ; 1871). Railroad companies are responsible in exemplary damages for the negligent and wrongful acts of their agents or employees (New Orleans, Jackson, and Great Northern R. R. Co. v. Bailey, 40 *Miss.* 395 ; 1866). A driver is acting in the line of his duty in helping a child or infirm person on or off the car, and the company is liable for the negligence of a driver in this respect (Drew v. Sixth Av. R. R. Co., 1 *Abb. Ct. of Appeals*, Dec. 556 ; 26 *N. Y.* 49). Where the driver is notified by a passenger to stop the car, and does so partially, and then starts on again, without notice, he is chargeable with negligence (Nichols v. Sixth Av. R. R. Co., 38 *N. Y.* 131). To entitle a passenger to recover against the carrier for being pushed off the platform of a street car, it must appear that an employee of the railway company did the wrongful act (Pesley v. Third Av. R. R. Co., 1 *Jones & Spencer*, 406 ; 1871). The driver of a street car having the right to put a person off the car, the company will be liable for his acts in doing so, even if his act should be malicious and willful (Meyer v. Second Av. R. R. Co., 8 *Bosworth, N. Y.*, 305 ; 1861).

 Defendant's points.

IV. All the authorities cited in the case of *Isaacs v. Third Avenue Railroad Company* (47 *N. Y.* 122), do not conflict with the general proposition above stated ; they only establish the general proposition, that "for willful trespass by its servant, defendant is not liable." The plaintiff does not dispute it ; but, in this case, he maintains there was no willful trespass.

V. There was a question of fact to be determined, and he had no power to assume the fact in one way or the other ; it was the province of the jury (*Thrings v. Central Park R. R. Co.*, 7 *Robt.* 616 ; *Murray v. New York Central R. R. Co.*, 4 *Keyes*, 274 ; *Deys v. Same*, 34 *N. Y.* 9 ; *Ernst v. Hudson River R. R. Co.*, 35 *N. Y.* 9 ; *Schwerin v. McKie*, 5 *Robt.* 304 ; *Wolfkiel v. Sixth Avenue R. R. Co.*, 38 *N. Y.* 49 ; *Renwick v. New York Central R. R. Co.*, 36 *N. Y.* 132 ; *Copkendal v. Eaton*, 37 *How.* 438 ; 55 *Barb.* 158 ; *Brouhard v. Rensselaer & Saratoga R. R. Co.*, 32 *Barb.* ; 1865 ; 1860 ; *Central R. R. Co. v. Moore*, 4 *Zabriskie*, *N. J.* 284 ; 1854).

Robinson & Scribner, attorneys, and *J. M. Scribner*, of counsel, for defendant, urged : I. The only question involved in this case is : Can a master be held liable for the willful, intentional, and malicious act of his servant, without proof that the act was authorized or subsequently ratified and adopted by the master ? The authorities are so numerous and positive against the liability of the master in such cases that it seems almost unnecessary for defendant to do more than to submit to the court the testimony of the plaintiff and his witnesses, and ask for judgment. The case is too plain for any argument. All the cases agree that a master is not liable for the willful mischief of his servant, though he be at the time in other respects engaged in the service of the former (1 *Chit. Pl.* 69 ; *McManus v. Cricket*, 1 *East*, 106 ; *Wright v. Wilcox*, 19 *Wend.* 343 ; Van-

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derbilt v. Richmond Turnpike Co., 2 *Comst.* 479; Clark v. Metropolitan Bank, 3 *Duer*, 241; Hibbard v. N. Y. and Erie R. R. Co., 15 *N. Y.* 467; Mali v. Lord, 39 *Id.* 383; Frazer v. Freeman, 43 *Id.* 566; Wells v. N. Y. Central R. R. Co., 24 *Id.*, cited from page 184; Isaacs v. Third Avenue R. R. Co., 47 *Id.* 122; Huges v. N. Y. & N. H. R. R. Co., 4 *Jones & Spencer*, 36 *Superior Ct. Rep.* 222; Courtney v. Baker, 37 *Id.* 249; Ryan v. Hudson River R. R. Co., 33 *Id.* 137; Congreve v. Ogden, 49 *N. Y.* 257; Poulton v. London & S. W. Railway Co., 2 *Law Rep.* [Q. B.] 534; Roe v. Birkenhead, &c., R. R. Co., 21 *Law Rep.* [Exch.] 9; Lamb v. Polk, 9 *Car. & P.* 629; Weed v. Panama R. R. Co., 17 *N. Y.* 362; Sanford v. Eighth Avenue R. R. Co., 23 *Id.* 313; Drew v. Sixth Avenue R. R. Co., 26 *Id.* 49; Higgins v. Watervliet Turnpike Co., 46 *Id.* 23; Whittaker v. Eighth Avenue R. R. Co., 51 *Id.* 295; Hagan v. Eighth Avenue R. R. Co., 15 *Id.* 380). Part 1, chap. 20, title 13, § 6, *R. S.*, which provides that the *owner* of every carriage running or traveling upon any turnpike or public highway for the conveyance of passengers *shall be liable*, in all cases, *for all injuries and damages done by any person*, in the employment of such owner *as a driver*, while driving such carriage, to any person, or the property of any person, whether *the act* occasioning such injury or damage *be wilful* or negligent, or otherwise, in the same manner, as such driver would be liable, does not apply to railroads (Whittaker v. Eighth Avenue R. R. Co., 51 *N. Y.* 295). It does not apply to the act of a conductor (Isaacs v. Third Avenue R. R. Co., 47 *N. Y.* 122).

BY THE COURT.—CURTIS, J.—The exception the case presents is that of the plaintiff to the dismissal of the complaint, by the court, on the ground that the evidence showed that the injury complained of

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was occasioned by the willful and unlawful act of the car-driver, defendant's servant, and not within the scope of his employment. The case shows that the plaintiff, while driving his buggy through Catharine street, crossed defendant's track so far that only the rear part of the hind wheels of his buggy remained upon the space occupied by the cars when in motion. At this point his further progress was arrested by a throng of trucks and other vehicles. The defendants' car soon approached, and the driver, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said "Damn you! if you don't get off here; I am late; I will get you off some way or other." The plaintiff said: "You wait a moment. I guess the trucks are moving, and I may go." The trucks started, and as the plaintiff prepared to move on, the driver started his horses, and the platform of the car hit, or as one of the witnesses says touched, the hind wheel of the buggy, and overturned it, thus causing the injury complained of.

From the evidence, it is apparent that the car-driver may have attempted to pass by the buggy either without hitting it, or else by shoving it around out of his way so he could get by, and that he committed an error of judgment in measuring the distance. This is consistent with his saying to the plaintiff, "I will get you off some way or other." He was late and hurried, and perhaps in his zeal to discharge his duty to his employer, he made the mistake which caused the injury.

Much stress at the argument was laid by the defendant upon the language of the driver, as indicating willfulness and malice, but that does not seem to be the necessary construction to place upon it. It indicates haste, and a desire to drive on, and has to be

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considered in the light of the surrounding circumstances, and a Chesterfieldian request could hardly be expected. It is quite probable if he had used his eyes as strenuously as he did his tongue, he would have been more careful, and the injury to the plaintiff would not have occurred.

It is claimed that upon the doctrine in the case of *Isaacs v. The Third Ave. R. R. Co.* (47 *N. Y.* 122), the complaint was properly dismissed, this being an analogous case. That was a case where, when a female passenger desired to alight from the car, and declined doing so until it stopped, the conductor threw her out upon the pavement, and it was considered that this was his unauthorized, wanton, and willful trespass, and that the defendant was not liable. But this case is not to be interpreted as holding that a defendant is to be exonerated from liability for injuries occasioned by the errors and negligence of his reckless, careless, or unskillful driver, because the driver manifests at the same time that he is ruffianly and brutal. It is nowhere intimated that the employment of car drivers or conductors of this latter class would benefit their principals, when questions of pecuniary responsibility for injuries arise. On the contrary, that case affirms the rule, that for a servant's act in his master's business, or within the scope of his employment, the master is liable for any abuse of authority conferred, or injuries resulting from errors of judgment, or mistake of facts, or from a negligent or reckless performance of duties by the servant.

The question to be passed upon here, is whether it should not have been left to the jury to determine as a question of fact if the act of the conductor was willful and malicious, or negligent and reckless, and deemed by him necessary to accomplish the purpose with which he thought himself charged.

There may be cases so near the line between law and

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fact that it is difficult to say to which side they belong; but the tendency of courts is to scrupulously watch that the right of a plaintiff, to have a question submitted to a jury should not be infringed upon. The principle in cases like the present is adhered to, that where the fact depends upon inferences to be drawn from the circumstances proved, about which honest men might differ, or the evidence is capable of different interpretations, then it is the plaintiff's right to have the question submitted to the jury (*Hackford v. N. Y. Central R. R. Co.*, 3 *N. Y.* 654; *Belton v. Baxter*, 58 *Id.* 411; *Salter v. Utica and Black River R. R. Co.*, 58 *Id.* 631; *Jackson v. Second Avenue R. R. Co.*, 47 *Id.* 274).

If the undisputed proofs in the present case showed that the act of the driver was unauthorized, willful, and malicious, and out of the scope of his employment, it was the duty of the court to dismiss the complaint, and if the question had gone to the jury on such evidence, and they had found a verdict for the plaintiff, it would also have been the duty of the court to set aside such a verdict as unsustained by the evidence. But the case presents this difficulty, that the undisputed facts are consistent with the plaintiff's claim that his injuries resulted from the negligence of the defendant's servant. They are capable of such interpretation. That inference is fairly to be drawn from them, and though men may honestly differ in their views in respect to them, still it is the province of the jury to pass upon the question, and the right of the plaintiff to have it submitted to them.

We think that the plaintiff's exceptions should be sustained, the verdict set aside, and a new trial ordered, with costs to abide the event of the action.

SEDGWICK, J., concurred.

Statement of the Case.

THOMAS HAMILTON, PLAINTIFF AND RESPONDENT,
v. THIRD AVENUE RAILROAD COMPANY,
DEFENDANT AND APPELLANT.

I. VERDICT.

1. PASSION AND PREJUDICE OF JURORS.

(a) *What not sufficient to establish that the jury was so actuated.*

1. The rendering a verdict on conflicting evidence, contrary to a strong intimation from the court, and assessing against a corporation damages at three hundred and fifty dollars, for injuries to the plaintiff's feelings, and a slight pinching of his hands, in ejecting him from a car for alleged non-payment of fare, is not sufficient.

II. DAMAGES.

1. EXCESSIVE.

(a) Three hundred and fifty dollars in above case is not.

III. TRIAL.

1. CHARGE THAT A CERTAIN QUESTION OF FACT IS NOT INVOLVED, WHEN NOT ERROR.

(a) It is not erroneous when there is *no sufficient evidence* in support of the fact.

1. The court is confined, in its instructions, to the scope and province of the proofs.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from an order denying defendants' motion for a new trial, and from a judgment in plaintiff's favor.

The action was brought to recover damages claimed to have been sustained by the plaintiff, upon being put off one of the defendant's cars, for non-payment of fare. The answer of the defendant denies that there was any such occurrence.

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Clarkson H. Potter, for appellant.

The Count Joannes, for respondent, among other things, urged :—The defendant demands a fourth trial of this action. Authorities and precedent are against any more than three trials, wherein a plaintiff has gained consecutive verdicts and judgments, without any disagreement by the respective juries (*Shaw v. Worcester Railway Co.*, 7 *Gray (Mass.) Rep.*). Verdicts fifteen thousand dollars; eighteen thousand dollars; and twenty-two thousand five hundred dollars. The Honorable Rufus Choate, for plaintiff to resist another trial, said that he had searched the English and American authorities, and he could nowhere find permission granted for a fourth trial, following three consecutive verdicts for a plaintiff against the same defendant, and for the same cause of action. Chief Justice SHAW refused a fourth trial of the same action.

BY THE COURT.—CURTIS, J.—The defendant urges that the verdict was flagrantly against the evidence, and should be set aside. The plaintiff testifies that he was expelled from defendant's car No. 2, having first been conveyed to defendant's depot in car No. 75, to the conductor of which he paid his fare through, and that he was then changed to car No. 2, the conductor of which told him to "come on," he "was all right," when he asked him if he required a ticket to go on that car. There was strong conflicting evidence on the defendant's part, with a strong intimation from the court that the plaintiff was mistaken. The question of fact was properly left to the jury. The evidence was conflicting, and however the court may have been impressed in regard to it, the province of the jury to pass upon it could not be invaded. At each of the three trials of this action the jury have found for the

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plaintiff upon this issue of fact; and this of itself, unless some strong reason to the contrary is shown, is a circumstance entitled to consideration when a motion is made to set aside the verdict as contrary to evidence.

But the defendant insists that the verdict of the jury was the result of passion and prejudice, and that this is evidenced by the disregard of the weight of evidence, and by the amount of the verdict, and that no such verdict would have been given against a natural person.

The jury had the witnesses before them, they had the best opportunity of determining who were and who were not reliable, and because they believed the plaintiff's testimony, and disbelieved that which was in conflict, it is not easy to see that the verdict was against the weight of evidence. Nor is it made apparent that in a similar case, and upon like proofs, such a verdict would not have been given against a natural person. There is nothing in the case that shows that the jury, in their manner or conduct or deliberations, were swayed by passion or prejudice.

At the first trial of this action, after the decision in it establishing the rule of damages, reported in 53 *N. Y.* 25, the jury rendered a verdict for one thousand five hundred dollars damages. On a motion for a new trial, this was set aside as excessive, and on the present trial, after the jury had been carefully cautioned by the court against committing a similar act, the plaintiff had a verdict of three hundred and fifty dollars. If the plaintiff's testimony was true, and the jury so found it, it is not clear that the sum awarded was an excessive recompense for the injury he testified was done to his feelings. The present verdict can not, in this view of it, be set aside as excessive, nor is it in collision with the intimation of the court when the preceding verdict was set aside.

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The only remaining point raised on the argument was that the judge erred in charging that this was a question of payment of fare, and not of production of a ticket, and that if the plaintiff had paid his fare, the company was liable for the mortification and injury to his feelings which resulted in his removal.

It may well be that if the regulations of the defendant required that the plaintiff should purchase a ticket before or after he entered the car, it was his duty to do so, and that he should also produce it when called upon by the conductor, and that if he failed to do so when asked, the conductor had the right to remove him from the train.

But it does not appear in the present case that the removal of the plaintiff from the car was in consequence of the non-purchase or non-production of a transfer ticket. No such reason for his removal was alleged in the answer or was shown on the trial. It was not proved that the defendant's regulations required the plaintiff to provide himself with such a ticket, or with any ticket. Defendant's superintendent testified that in 1868, "payment of seven cents fare on a Harlem car would have entitled a passenger to one continuous passage on the same car to any point on the downward track of the road until after 4.33 P.M., when the 'through cars' began to run off, after which hour the passengers would be passed, at the depot, to 'another car.'"

"No passenger is passed until the run-off trips begin in the afternoon; the conductor then passes the number. I had twenty-five passengers. The conductor of the other car then takes the passengers, without a check, and without a fare; that is only at night, on the 'run-off' trips." This is vague, and the last sentence possibly refers to the practice of the defendant, at the period he testified, instead of the time of the occurrence complained of. It is not proved that any

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duty devolved upon the plaintiff to provide himself with a transfer ticket, or that a rule of defendant's existed to that effect. The evidence is that he not only was unsupplied with one, but that the conductor told him, in substance, that it was unnecessary to have one when he entered the car. The conductor testifies he does not recollect about it, but neither he nor the driver testify that there was any practice or rule at that time requiring passengers to provide themselves with such tickets.

There was no sufficient foundation laid for the judge to instruct the jury that they should consider whether the plaintiff had a transfer ticket, and refused to produce it, that in case he had one, and so refused, that the conductor had a right to remove him. The court is confined, in its instructions to the jury, to the scope and province of the proofs, and can not go beyond to charge as to contingencies and obligations not embraced or affected by them. This exception to the charge can not be sustained, and the charge seems to accord with what was held to be the proper measure and limit of damages in the decision in this case heretofore referred to.

The judgment and order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

Statement of the Case.

FRANCIS B. HEGEMAN, PLAINTIFF AND RESPONDENT, v. MARY A. CANTRELL, *et al.*, DEFENDANT AND APPELLANT.

I. VERDICT.

1. POWER OF THE COURT TO SEND BACK A JURY, AFTER HAVING ANNOUNCED THEIR VERDICT, FOR RE-CONSIDERATION.

(a) *Before the verdict is recorded*, the court may, if it appear to be a mistaken one, send the jury back for a further consideration.

II. ISSUES FRAMED IN AN EQUITY CAUSE FOR TRIAL BY JURY.

1. DECISIONS MADE DURING THE TRIAL, AND THE VERDICT ITSELF, AS TO BEING SUPPORTED BY SUFFICIENT EVIDENCE, HOW TO BE REVIEWED.

(a) *Only, either on the hearing of the cause at special term for the trial of equity causes, or on a case with exceptions, to be made and settled as provided in other cases, or on a motion upon the minutes.*

2. VERDICT, CONCLUSIVENESS OF.

(a) The court, at the ultimate hearing and disposal, exercises its discretion, and *is not precluded* from rejecting the verdict, and ordering a new trial, or from finding the question of fact itself.

III. APPLICATION OF THE PRINCIPLES.

Three questions were framed for trial by jury. The judge charged the jury that if they found the first two in the affirmative, they should render a certain specified finding on the third, but if they found the first two in the negative, then they should render a certain other specified finding on the third. The jury retired, and brought in a verdict finding the first two questions in the negative, but finding the third in the manner in which by the charge they were authorized to find only in case of finding the first two in the negative. The court refused to receive the verdict, repeated its charge, and sent the jury back for further consideration. The jury returned with a verdict finding the first two questions in the negative, as before, and as to the third, in the manner in which by the charge they were directed to find it in the event of finding the first two in the negative. The verdict was against the defendant. The

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cause was then brought on and heard at a special term as an equity cause. No evidence was offered by the defendant. Judgment was rendered for the plaintiff. Afterwards defendant moved to set aside the verdict on affidavits and the judgment roll.

HELD:

1. That on such a motion, which brought neither the evidence nor the charge before the court the question as to whether there was error in the charge, could not be entertained.
2. That from so much of the charge as was before the court there seemed to be an inconsistency in the first verdict which authorized the trial judge to refuse to receive it, and send the jury back.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal by the defendant Mary A. Cantrell, from an order made October 21, 1875, denying her motion to set aside the verdict of the jury.

The action was brought to foreclose a mortgage to secure the sum of twelve thousand five hundred dollars, by the defendant to the plaintiff. The defendant set up the defense of usury, claiming that she, in fact, received but eleven thousand five hundred dollars, and that the difference was deducted by the plaintiff, as an additional percentage for making the loan.

On October 5, 1874, the following special issues were framed to be tried by a jury.

First—Was there any agreement between the plaintiff, Francis B. Hegeman, and the defendant, Mary A. Cantrell, other than the one set forth in the bond and mortgage referred to in the complaint herein?

Second—Was there any unlawful or corrupt agreement between the plaintiff, Francis B. Hegeman, and the defendant, Mary A. Cantrell, by which it was

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agreed that the said defendant, Cantrell, should pay to the plaintiff, for the loan of the sum of twelve thousand five hundred dollars, secured by the bond and mortgage of said Cantrell, referred to in the complaint, the sum of thirteen hundred and fifty dollars, over and above the seven per cent. specified in said bond and mortgage?

Third—What amount of money did the plaintiff advance on the bond and mortgage set forth in the complaint?

It was further ordered that such issues be tried on notice from either party to the other of two days at any trial term of this court, and said issues, when determined, be certified to this court for final judgment thereon herein.

The issues were tried and submitted to a jury, March 18th, 1875.

After the charge of the court, the jury retired, and brought in their answers to the issues, as follows: To the first and second issues they answered "No," and to the third issue, "Eleven thousand one hundred and fifty dollars."

The court declined to receive the verdict, or to have it recorded, and directed the jury to retire to their room for further deliberation. The affidavits as to what occurred are conflicting. It appears by the stenographer's minutes, as stated in the defendant's moving papers, that the court read again to the jury this portion of the charge: "I have charged you, there is no direct evidence that the plaintiff knew anything of the transaction of Canis, or even heard of it; yet if you believe the testimony of Mrs. Cantrell, and upon that, in connection with the other evidence in the case, can satisfy yourselves, upon your oaths, that there was collusion between the plaintiff and Mr. Dorland, as her agent, on the one side, and Canis on the other, and this deduction of one thousand three

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hundred and fifty dollars was a mere device, contrivance, &c., to defeat the provisions of the statute, and to secure to the plaintiff a greater rate of interest for the loan of the money than the legal rate, or if this device originally resorted to by Mr. Dorland, without authority, was subsequently ratified by the plaintiff with full knowledge of the facts, then in either case you will answer yes to the first two questions, and in response to the third, you will fix the amount of money advanced by the plaintiff on the bond and mortgage set forth in the complaint, at the sum of eleven thousand one hundred and fifty dollars. These are the only conditions upon which you are to find 'Eleven thousand one hundred and fifty dollars.'

"If you believe the other theory that the plaintiff was not directly or indirectly guilty of usury in any of the various ways, in which I have instructed you she may have become liable, you must find a verdict for twelve thousand five hundred dollars."

The defendant's counsel excepted. The jury again retired, and returned with their verdict, answering "No" to the first and second issues, as before, but to the third issue they answered "Twelve thousand five hundred dollars."

The defendant then moved for a new trial on an affidavit, which was denied, April 7th, 1875.

The cause was then proceeded with at the April special term, and heard as an equity cause. No evidence was offered by the defendant. Judgment was rendered for the plaintiff on or about April 8th, 1875.

In September, 1875, the defendant moved on affidavits and the judgment roll to set aside the verdict found by the jury, before whom the special issues were tried.

This motion was denied, and from the order denying it, this appeal is taken.

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Henry C. Morange, for the appellant.

A. H. Wagner, for the respondent.

BY THE COURT.—CURTIS, J.—The finding of the jury upon the third issue submitted to them was probably inconsistent with their findings as to the first and second issues also submitted to them. In the absence of the charge of the judge, and of all the evidence, as there is no case made by which either of these are brought before the court, on this application, it is not easy to perceive what transpired at the trial. This inconsistency was apparently an error, or oversight, to which the court, upon receiving from the foreman the findings of the jury, immediately called their attention, and directed them to retire for further consideration. This was the proper course to be pursued by the court.

A verdict is of no force until given openly in court, and received and recorded, and until received and recorded the jury have a right to retire, and to further consider their verdict and to alter it. The practice has long prevailed that the court may of its own accord send the jury back to reconsider their verdict, when it appears to be a mistaken one, before it is received and recorded (*Root v. Sherwood*, 6 *Johns.* 68). If the verdict is in writing, it makes no difference, and the jury have the same right, before it is received and recorded, to retire and to re-consider it, and to vary from their first finding (*Blackley v. Sheldon*, 7 *Johns.* 34).

As far as can be gathered from what is before us as to what transpired at the trial, and the delivery of the verdict, there was eminent propriety in the court sending back the jury to further consider the questions submitted. If there was an oversight or an incongruity in their finding, they had an opportunity of correcting it; and if there was not, they had an oppor-

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tunity for further deliberation and intelligent consideration, and of answering the questions, as they might find they should be answered from the evidence.

If there was any error on the part of the judge in giving instructions or directions to the jury, it is very difficult for us to pass upon it without having either the testimony or the charge before us. The affidavits of jurymen, taken *ex parte*, and long after the trial, are liable to be affected by failure of recollection or by sympathy for the losing party. At any rate, the Rules, hereafter referred to, and settled practice of the court, have long established another course of procedure that may be pursued to set aside a verdict, and to obtain a new trial of special issues.

The issues in an equity cause are framed and sent to a jury simply to inform the conscience of the court. At the ultimate hearing and disposition of the cause, the court exercises its discretion as to how far it is to be controlled by the findings of the jury, and is not precluded even then from rejecting the verdict, or ordering a new trial, or from finding the question of fact itself (*Patterson v. Ackerson*, 1 *Edwards Chy. R.* 103; *Brown v. Clifford*, 7 *Lansing*, 53; *Vermilye v. Palmer*, 52 *N. Y.* 475).

In order to justify and speedily review the trial of the issues sent to a jury for determination, the Rules of the court require either party feeling aggrieved by the determination of such special issues, and desirous of a new trial on the ground of any error of the judge, or on the ground that the verdict is against evidence (except where the judge directs such motion to be made upon his minutes), to make such motion on a case and exceptions, or a case containing exceptions, to be served and settled, as provided in other cases (*Rule 33*, 1858; *Rule 40*, 1874).

If this application brought before us the proofs at the trial, and the judge's charge, instead of the conflicting

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allegations of *ex parte* affidavits, it would greatly facilitate the inquiry as to the grounds of the alleged errors of the court. But giving the application such consideration as what is presented by the papers warrants, there fails to be disclosed ground for reversing the order appealed from, and for setting aside the verdict.

The order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

JOHN P. GOULD, PLAINTIFF AND RESPONDENT, v.
JOHN T. MOORE, DEFENDANT AND APPELLANT.

I. TRIAL, CONDUCT OF.

1. GENERAL OBJECTION, WHAT CAN NOT BE URGED UNDER, ON APPEAL.

1. Question stating facts assumed to have been proved.

(a) A decision overruling a general objection to such a question can not be impugned on appeal on the ground that there was no proof of the facts on which the question was based.

2. SUMMING UP.

1. REFERENCE BY COUNSEL TO MATTERS NOT PROVED, OR OF WHICH THE PROOF WAS EXCLUDED.

1. It is highly improper.

2. It is the duty of the court not to permit it.

3. Error. It is error to permit it after objection made.

But

if, on objection, such reference is immediately rebuked by the court, and not persevered in, *it is not cause for reversal*, unless it was made in bad faith, and might have prejudiced the defeated party.

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II. NEWLY DISCOVERED EVIDENCE, MOTION FOR NEW TRIAL ON THE GROUND OF.**1. AFFIDAVIT OF WITNESS WHO IS TO GIVE IT IS REQUISITE.****(a) Death of witness, what necessary in case of.**

1. Documentary or other proofs corroborating or establishing what it is alleged could have been shown by him.

(b) DILIGENCE.

When the evidence claimed to have been newly-discovered is that there was a person who could have testified that he had paid for the services rendered, and the discovery, was claimed to have been first made by such person stating to the counsel of the defeated party, a few days after the trial, that he had made such payment, but it appearing that such person, at the time of the rendition of the services was, and down to, and after the trial (which covered a long period of time), had been on terms of intimacy with the defeated party, and had some connection with the transactions, out of which the claim for services arose.

HELD

that reasonable diligence had not been shown.

1. That the successful party had frequently told the counsel for the unsuccessful one that such person had never paid him, *does not excuse non-enquiry* of such person as to the fact.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal by the defendant from a judgment, and from an order denying a motion for a new trial upon the ground of newly-discovered evidence. The action is brought to recover the value of services alleged to have been performed for defendant in obtaining a compromise of his indebtedness. The defendant denies the employment, extent, and value of the services, and their performance. A verdict was rendered against the defendant for sixteen thousand two hundred dollars.

It appeared upon the trial that the defendant was

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one of the late firm of C. W. & J. T. Moore & Co., merchants, of the city of New York, who failed, and made an assignment, on December 4, 1861, at which time their indebtedness amounted to about one million dollars. The partners, excepting the defendant, took proceedings for a discharge under the bankrupt act. Defendant did not.

In 1868, the plaintiff called upon the defendant, and proffered his services to secure the release of the defendant from his liabilities, which he said could be done for about seventy thousand dollars.

Soon after, the plaintiff proceeded with his negotiations for a compromise, the claims against defendant at that time being about six hundred and seventy thousand dollars or six hundred and eighty thousand dollars, and the defendant having furnished him with a statement of the same. The defendant claims that this employment was by and on account of Mr. Edwin Hoyt.

As fast as plaintiff effected compromises, he had the claims assigned to Mr. Hoyt, or in blank, and delivered the assignments to Mr. Hoyt, who, if in blank, inserted his own name as assignee. Mr. Hoyt furnished the money to make the compromises. The plaintiff finally compromised about three hundred and fifty thousand dollars of defendant's indebtedness.

In all cases Mr. Hoyt furnished the money, and became substituted as defendant's creditor.

It was admitted at the trial that the plaintiff made a great many exertions to effect compromises of defendant's debts that were unsuccessful. There was evidence as to the value of the alleged services.

Miller, Peel & Opdyke, attorneys, and *Livingston K. Miller*, of counsel for appellant, urged: I. The motion for a new trial on the ground of newly discovered evidence should have been granted. *First*.—Facts

Appellant's points.

shown on motion for a new trial : 1. That defendant's attorneys had been informed by plaintiff, in conversations with him, that Mr. Hoyt had never paid him. This is not denied by plaintiff. 2. That Hoyt had paid the plaintiff in full for the services in this suit, and would so testify. 3. That, at the trial, he (Hoyt) was too sick to be out, and could not attend. 4. Although Mr. Hoyt is dead, the evidence is in his books, and will show that it was he that employed plaintiff to do these services, and paid him for it. Rules of law as to new trial on account of newly-discovered evidence : 1. That evidence has come to party's knowledge since the trial. 2. That it was not owing to want of diligence that the evidence was not discovered before trial. (a) Hoyt was too sick to be seen or examined. (b) Plaintiff deceived defendant's counsel as to the fact, and therefore induced him to disbelieve the fact, which now is found to be true. 3. The new evidence must be material so as to produce a different verdict. 4. It must not be cumulative. This last rule is very strictly applied, "but it has exceptions occasionally." If it appears that if received, the most obvious justice, and, if rejected, the most obvious injustice, will be done, courts do not hesitate to adopt the former alternative (*Graham & Waterman on New Trials*, 3, p. 1064; *Barker v. French*, 18 *Vt.* 460.) 5. The affidavit of the witness must be produced or excused. In this case he was too sick, and the affidavit of two persons with whom he conversed is given. We submit that on the motion for new trial all the foregoing requisites have been complied with.

II. The motion for new trial upon the judge's minutes should have been granted, because the verdict is contrary to, and not sustained by the evidence.

III. There was no evidence on which the jury could fix the valuation of services. The only witness was W. C. Noyes, and his answer was to a question setting out a set of facts, none of which were proved in the case.

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Plaintiff, who swears to value, is not shown to be an expert in such matters. The exception to the decision overruling the objection to the questions put to Noyes, is well taken. The case was entirely supposititious.

IV. The judgment should be reversed, because the plaintiff's counsel, on the trial of this action, in summing up to the jury, violated well-established principles of law, by referring to matters not in evidence and making them a part of his summing up. There can be no doubt that these matters seriously affected and prejudiced defendant. That it was an unpardonable license, and in violation of the privileges of counsel, will be obvious upon reference to the following authorities: *Waterman on New Trials*, 685; *Legg v. Drake*, 1 *McCook*, 286; 1 *Ohio S. R.*; *Dickerson v. Burke*, 25 *Geo.* 225; *Tucker v. Heniker*, 41 *N. H.* 317; *Vide Muldoon v. State*, 11 *Geo.* 615, 629; *Berry v. State*, 10 *Geo.* 522; *Martin v. Orndorff*, 22 *Iowa*, 504; *Hoxie v. Home*, 33 *Conn.* 471; *Cooke v. Ritter*, 4 *E. D. Smith*, 253; *Crandall v. People*, 2 *Lansing*, 313; *Waterman on New Trials*, 655, 4 *N. H. Rep.* 213; *Koelges v. Guardian Mu. L. I. Co.*, *N. Y. Com. of Appeals*, *MSS.*

Nelson Smith, attorney, and of counsel for respondent, urged: I. The proof on the part of the plaintiff showed the employment, what the services were, and what they were worth.

II. The exception taken by the defendant (and the only one taken by him) to the decision of the court overruling his objection to the question put to the witness Noyes, was not well taken. 1. The assumptions embraced in the question were fully justified by the testimony, which had been given, and therefore the question was proper. 2. The objection to the question is general. It does not specify any ground. Had grounds of objection been mentioned,

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they might have been obviated. It is well settled in such cases, that the party objecting must specify his grounds, or his exception can avail him nothing (*Fountain v. Pettee*, 38 *N. Y.* 184-186; *Malony v. Perkins*, 9 *Bosw.* 576; *Doane v. Eddy*, 16 *Wend.* 526; *Merritt v. Seaman*, 6 *Barb.* 230).

III. The remarks attributed to the plaintiff's counsel in summing up, even conceding them to have been improper, were immediately disapproved and corrected by the court; there is no pretense, therefore, for saying that they could have influenced the jury to the prejudice of the defendant, or that they could have been in any manner adopted either by the court or by the jury. It is only when improper matters are brought into the summing up, and where the court, upon having the point raised, permits them, that objection can be taken upon appeal. Besides, there is no exception, and could not be, as the ruling of the court in relation to them was in favor of the defendant, and any impropriety, if such there was, was corrected at the time, before the case went to the jury.

Points upon the motion for a new trial upon the ground of newly-discovered evidence.—I. The motion for a new trial, on the ground of newly-discovered evidence, was properly denied (*People v. N. Y. Superior Court*, 10 *Wend.* 285; *Hollingsworth v. Naper*, 3 *Cai.* 182; *People v. Mack*, 2 *Park Cr. R.* 673; *Shumway v. Fowler*, 4 *Johns.* 425; *Whelrough v. Beers*, 2 *Hall.* 391). (a) In *People v. N. Y. Superior Court*, SAVAGE, Ch. J., lays down the following principles as well settled, on motion, for a new trial on the ground of newly-discovered evidence. (1) Testimony must have been discovered since the former trial. (2) It must appear that the testimony could not have been obtained with reasonable diligence on the former trial. (3) It must be material to the issue. (4.) It must go to the merits of the case, and not impeach the character of a

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former witness. (5) It must not be cumulative (10 *Wend.* 293). We may add three other grounds which in the nature of things partake of the vital elements of the motion. (1) It must appear that there is newly-discovered evidence, and that must be shown by the affidavit of the witness alleged to be newly-discovered (*Shumway v. Fowler*, 4 *Johns.* 425 ; *Adams v. Bush*, 2 *Abb. Pr. N. S.* 110 ; S. C., 1 *Abb. Ct. App.*, Dec. 7). (2) It must appear that the witness can be obtained to testify upon the new trial in case it is ordered. The fact of Mr. Hoyt, the witness here, being dead, is a complete answer to the motion (*Shumway v. Fowler*, *supra*). (3) The proposed testimony must be such that the witness, if produced at the new trial, would be compelled to testify upon the subject. If the matter is privileged, or would degrade the witness, so that he would be excused from testifying, it is not ground for granting the motion. So held in *Shumway v. Fowler*, *supra*. The motion made here was obnoxious to all of the above objections.

BY THE COURT.—CURTIS, J.—There is no force in the defendant's objection that the verdict is contrary to the evidence, and not sustained. The plaintiff testified to his employment by the defendant, and that he rendered the services on his behalf, and at his request. Other evidence in the case corroborates the plaintiff's statement. There was conflicting evidence on the defendant's part, and these questions of fact were fairly submitted to the jury, who found for the plaintiff. No sufficient reason is shown to set aside the verdict as contrary to evidence.

The jury having found for the plaintiff upon the issues of fact, the defendant urges that there was no evidence upon which they could determine the value of the plaintiff's services. The plaintiff was bound to prove the value of his services. The plaintiff

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testified without objection that he considered the services which he had performed for the defendant, and which he enumerated, were worth from fifteen thousand dollars to twenty thousand dollars. He had previously testified as follows: "I have had other cases besides this to settle, where I have come into contact with others engaged in the same business. My familiarity with others in the same business in the city of New York has continued more or less for three years. I have had other cases to settle for creditors against other parties—merchants in New York. I have been engaged in the general collection business, and in having suits brought, &c., in connection with collections." Another witness testified to having ten or eleven years' experience in this class of business, and to having a knowledge of the value of such services. In answer to a question enumerating the services which the plaintiff testified he had rendered, and asking him what, in his judgment, the plaintiff would be entitled to for such services, the witness estimated them to be worth twenty thousand dollars. Before answering the question, it was objected to generally by the defendant, no ground of objection being specified, and an exception was taken to the ruling of the court admitting the question.

Upon the argument, it was claimed that this question was based upon a set of facts not in the case, and that the exception was well taken. The exception is untenable for two reasons. The defendant should have stated the ground of his objection to the court, so that his opponent could have had the opportunity very possibly of obviating the objection. It is no part of the policy of the law that objections for which no reason is assigned, lest they should be obviated, should be sustained (*Walsh v. Wash. Ins. Co.*, 32 N. Y. 440; *Fountain v. Pettee*, 38 N. Y. 186; *Mallory v. Perkins*, 9 Bosw. 577).

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Again, upon the ground claimed at the argument, that the question calling out the answer was based upon a set of facts not proved at the trial, the exception fails ; for there appears to be nothing stated in the question except what was testified to at the trial. If there was any error, it should have been pointed out, so that it could have been corrected in the question. The plaintiff, by a general objection to a question of this kind, is not obliged to consume time, and protect himself, by reading over all the testimony as to the plaintiff's services, and then ask the witness his opinion as to what they are worth.

Another ground upon which the defendant seeks to have the judgment reversed is, because the plaintiff's counsel, in summing up to the jury, referred to matters which, when offered in evidence, had been excluded by the court.

It is no part of the office of an advocate to seek to influence the verdict of a jury, by presenting to their consideration, in his summing up, matters which have been excluded as evidence by the court. Especially when objected to, it is the duty of the court not to permit it. To allow matters excluded as evidence, to be referred to, or presented, in summing up, so as to affect the deliberations of the jury, or to influence their passions or prejudices, or otherwise to lead them from the line of duty pointed out by their oaths, is at variance with the primary principles of justice. Acts of this kind lead to unjust verdicts, and where they have the sanction of the judge, call for a reversal of the judgment (*Koelges v. Guardian Life Insurance Co.*, 57 N. Y. 638 ; *Crandall v. People*, 2 *Lans.* 312).

But it must be observed that the present case differs in these respects from those referred to. There is no exception, and none could be made, as the ruling was in defendant's favor. Again, in the reference (on two occasions) by defendant's counsel, in his summing

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up, to matters which had been excluded when offered in evidence, the case shows that such reference was promptly objected to, and immediately rebuked by the court, and not persevered in by the defendant's counsel. Under such circumstances, unless it was apparent that such reference was made in bad faith, and may have prejudiced the objecting party with the jury, a reversal is not called for.

The defendant fails to show that he was, or could have been, prejudiced with the jury, by the reference to these matters by the counsel, nor is it easy to see how he could be; while there is nothing in the case that establishes that the reference to these matters by the counsel was anything more than a misapprehension as to the evidence. It would, under such circumstances, be unwise and unjust to reverse the judgment for this reason.

The defendant seeks for a new trial on the ground of newly-discovered evidence. It appears that in March, 1874, a few days after the verdict, Mr. Edwin Hoyt stated to the defendant, and to one of his counsel, that he had paid the plaintiff in full for the services. Mr. Hoyt died in May following. No affidavit of his is presented, nor are any copies of entries in his books, or of receipts from the plaintiff, or memoranda even, of any kind, presented to confirm Mr. Hoyt's statement though he referred to his books in his conversation about it. If this had been done, the plaintiff might have had an opportunity of explaining or meeting it.

As it is, the plaintiff denies that he has been paid any compensation by Mr. Hoyt for these services, and does not dispute the affidavit of the defendant's counsel, that he told him so, and who claims to have been misled by such statement of the plaintiff.

It appears that the relations between the defendant and Mr. Hoyt were very intimate, and had so continued

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for many years; that the defendant had proposed to the plaintiff to refer this controversy to Mr. Hoyt, as referee or arbitrator; and that after the trial, Mr. Hoyt was as usual about his business until within a week of his death.

This motion for a new trial was noticed upon affidavits for the first Monday of March, 1874, and some weeks before Mr. Hoyt's decease.

Considering the long period that intervened between the rendering of the services and the trial of the action, and the familiar intercourse between the defendant and Mr. Hoyt, it appears extraordinary that the defendant should not have discovered this payment to the plaintiff, if it had really taken place. A very moderate degree of diligence on the defendant's part would have led to the discovery of it before the trial, or at least have secured Mr. Hoyt's affidavit and documentary proofs, if any there are, of such payment, for the purposes of the motion for a new trial.

To grant a new trial on the ground of newly-discovered evidence, where there is no affidavit from the witness as to what he will testify to, and in case of his death, where there are no documentary or other proofs offered to corroborate or establish what it is alleged could have been shown by him, would be a departure from well settled rules. Besides this, a party is bound to be reasonably diligent in ascertaining and presenting his evidence at the trial. It would be a dangerous doctrine to allow a party to take his chances at a trial without reasonable preparation, and then grant him a new trial, because he had through his own neglect omitted to discover and present evidence that lay in easy reach (*Oakley v. Sears*, 7 *Robt.* 111; *Quinn v. Lloyd*, 1 *Sweeny*, 253; *Adams v. Bush*, 2 *Abb. Pr. N. S.* 104; *Shumway v. Fowler*, 4 *Johns.* 425; *Deom v. Morrill*, 1 *Hall*, 382).

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The judgment and order appealed from should be affirmed with costs.

SEDGWICK, J., concurred.

FAYETTE S. PIERCE, *et al.*, PLAINTIFFS AND APPELLANTS, v. PAUL S. BROWN AND MORTIMER S. BROWN, DEFENDANTS AND RESPONDENTS.

I.—COSTS.

1. SEPARATE BILLS FOR SEVERAL SUCCESSFUL DEFENDANTS.

(a) § 306 of the Code, as amended in 1851, regulates the whole subject, and confines the right to separate bills to the cases therein expressly mentioned, to the exclusion of all others.

1. In an action for damages against two defendants who originally appeared and answered by the same attorney, but by separate answers, and subsequently another attorney was substituted for one of the defendants, and thereafter the complaint was dismissed as to both,

HELD,

that the decision of the taxing officers that separate bills could be allowed, was correct.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from an order affirming the decision of the clerk taxing a bill of costs of the defendant Mortimer S. Brown. The facts appear in the opinion.

Wm. R. Baldwin, attorney, and *M. Compton*, of counsel for appellant, urged: To entitle a defendant

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to costs under section 306, on a dismissal of the complaint, it is manifest there must be separate defenses, separate answers, and separate attorneys, and the court must award such costs as a part of the relief * (*Castellano v. Beauville*, 2 *Sandf.* 670; *Tracy v. Stone*, 5 *How. Pr.* 104; *Brockway v. Jewett*, 16 *Barb.* 590; *Atkins v. Lefevre*, 5 *Abb. N. S.* 221; *Crofts v. Rockfeller*, 6 *How. Pr.* 9; *Fairbank v. Paige*, 6 *Hill*, 267; *Perry v. Livingston*, 6 *How. Pr.* 404; *Bank v. Sturdy*, 15 *Abb. Pr.* 75; *Allen v. Wheeler*, 56 *N. Y.* 50; 3 *Wait's Pr.* 469; *Willen & Sheldon v. Wiltsie*, 13 *How. Pr.* 506).

La Roy S. Gove, attorney, and of counsel for respondents, urged:—The defendants are sued in an action of tort; they put in separate answers; they had separate attorneys in the action and on the trial, as they had a right to have. Each is entitled to costs (*Castellano v. Beauville*, 2 *Sandf.* 670; *Colcomb v. Caldwell*, 5 *How.* 336; *Bridgeport Ins. Co. v. Wilson*, 12 *Abb. Pr.* 209; *S. C.*, 20 *How.* 511). This was always allowed in an action for a tort (*Tenbroeck v. Paige*, 6 *Hill*, 267; *Stone v. Duffy*, 3 *Sandf.* 761; *Marks v. Bard*, 1 *Abb. Pr.* 63; *Zink v. Atterburg*, 18 *How.* 108; *Decker v. Gardner*, 8 *N. Y.* 29; *Daniels v. Lyon*, 9 *Id.* 549).

BY THE COURT.—CURTIS, J.—The action was brought against the two defendants, to recover damages for defrauding the plaintiffs by conspiracy and collusion. The complaint was dismissed at the trial, and the defendants recovered judgment against the plaintiffs. The clerk allowed costs to each defendant, the judge at special term affirmed the allowance by the clerk,

* NOTE BY REPORTERS.—See *Haye v. Robertson*, 38 *N. Y. Supr. Ct.* 59.

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and the plaintiffs appeal from the order of affirmance. Both defendants originally appeared and answered by the same attorney, but by separate answers. Subsequently another attorney was substituted for the defendant Mortimer S. Brown, who claims a separate bill of costs.

The Code, § 306, provides "That in all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them."

This provision of the Code applies precisely to the case of these defendants. They were not united in interest, and they made separate defenses by separate answers. There is no claim, and it does not appear, that the defendants in defending separately, acted in bad faith, and for the purpose of increasing the recovery of costs, or that in allowing costs there was any unreasonable exercise of the discretion of the court.

In the case of *Allis v. Wheeler* (56 N. Y. 50), overruling some of the earlier cases, it was held that this provision of § 306, as amended in 1851, regulated the whole subject of the recovery of costs in all classes of actions by one or more of several defendants obtaining judgment, and that it confined the right of such recovery to the cases therein expressly mentioned, to the exclusion of all others.

This ruling disposes of the question raised by the appellants on this appeal, and the order appealed from should be affirmed with costs.

SEDGWICK, J., concurred.

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HUGH D. COTHRAN, *et al.*, PLAINTIFFS AND RESPONDENTS, v. THE HANOVER NATIONAL BANK OF NEW YORK, DEFENDANTS AND APPELLANTS.

I. DAMAGES.

1. CHOSE IN ACTION, CONVERSION OF.

(a) *Promissory note, bill of exchange, &c.*

1. Measure of damages *prima facie* is the amount due upon it.

(a) *Mitigation, insolvency.*

1. In mitigation of damages it may be shown to be of little or no value *by reason of the insolvency of the parties, or for any other cause.*

II. SUPPLEMENTAL ANSWER. MOTION FOR LEAVE TO SERVE.

1. DEFENSE.

(a) What may be properly allowed to be set up by supplemental answer.

1. In an action for damages for the conversion of a chose in action, *facts* showing it to have been of little or no value at the time of the conversion, may be allowed to be so set up in mitigation of damages.

2. LACHES.

If the defendant is ignorant of the matters at the time of his answer, and moves without delay after discovering them, he is not guilty of laches.

3. FALSITY, WHEN MOTION NOT TO BE DENIED BY REASON OF ALLEGATION OF.

(a) Where the opposing papers deny insolvency, but it appears that the draft, the parties to which were claimed to have been insolvent, was not paid at maturity, and other matters appeared tending to show insolvency, *a case is presented for a disposal of the question by trial.*

Before CURTIS, SEDGWICK, and VAN VORST, JJ.

Decided February 7, 1876.

Appellants' points.

Appeal from an order denying defendants' application for leave to file a supplemental answer.

The action is for the conversion of a draft, dated July 1, 1873, drawn by McWilliams & Co., on and accepted by the Cornwall Iron Works, for two thousand six hundred and seventy-five dollars and twenty-one cents, at ninety days after date, to the order of the drawers, and by them endorsed. The allegations of the complaint are, that the plaintiffs being owners of the draft so accepted, endorsed it in blank, and sent it to defendants for discount; that the defendants did not discount the draft, and have not returned it to plaintiffs, and that before its maturity the draft came into the hands of a purchaser in good faith and for value, and plaintiffs thereby became liable to pay it. By its answer defendants admitted that it received the draft and did not discount it, but delivered it in good faith to one Maguire, whom it believed to have authority to receive it. It also denied the conversion, and the alleged facts by which plaintiffs claimed to have been made liable by reason of their endorsement.

In April, 1875, defendants having learned that the plaintiffs had been adjudged bankrupts, moved for leave to plead the fact of transfer of the cause of action by virtue thereof to the assignee in bankruptcy. On the adoption of the action by the assignee in bankruptcy, the motion was denied. Thereafter the action was continued by the assignee, in the name of the plaintiffs.

On facts alleged to be newly-discovered, the defendants applied for leave to interpose a supplemental answer, and from the order denying that application, this appeal is taken.

Tracy, Olmstead & Tracy, attorneys, and *Charles E. Tracy*, of counsel for appellants, urged:—I. It was shown by affidavit, not controverted, that at the time

Appellants' points.

of making its answer, the defendants were ignorant of the facts stated in the proposed supplemental answer.

II. The insolvency of the makers and acceptors of the draft clearly might be proved in mitigation of damages (*Sedgwick on Damages*, 488 ; *Ingalls v. Lord*, 1 *Cowen*, 240). That the draft had not been actually paid by any one of the parties thereto, and had not been proved in bankruptcy against the plaintiffs, were also facts admissible in mitigation of damages. For if proven, the plaintiffs could only recover on one of two grounds ; first, that they had been deprived of their claim upon the draft, in case it was good in their hands as against the other parties ; or, second, that by reason of their endorsement of the draft, they had come under liability to a third party. In neither case could the plaintiffs recover the full amount of the draft ; in the first, they could recover only what they had lost, because that was the value of the draft ; in the second, only the dividend which the assignee in bankruptcy should pay, because the plaintiffs' cause of action is his, and his damages are not greater than the dividend in bankruptcy to the third party. These last two facts, if proven, reduce the cause of action to one for nominal damages only.

III. New matter constituting a partial defense must be pleaded, even though it be only in mitigation of damages (*McKyring v. Bull*, 16 *N. Y.* 308 ; *Bush v. Prosser*, 11 *Id.* 347 ; *Joland v. Johnson*, 16 *Abb.* 239 ; *Beckett v. Lawrence*, 7 *Abb. N. S.* 403 ; *Wehle v. Haviland*, 42 *How. Pr.* 399, 407).

IV. Ordinarily the court will not try the truth or falsity of the supplemental answer upon such a motion, and it never does, unless it is clearly a sham pleading. The fact that the draft had not been paid at maturity by either of the parties is admitted, and no reason is shown for its non-payment ; presumpt-

Respondents' points.

ively, therefore, the parties were not able to pay, and were insolvent (*In re Bininger*, 7 *Blatchford*, 264; *Herrick v. Borst*, 4 *Hill*. 652).

Anderson & Man, attorneys, and *Frederick H. Man*, of counsel for respondents, urged:—I. The first matter in defense sought to be pleaded by the supplemental answer, viz., that all parties to the draft were insolvent at and before its maturity, is disproved. In this aspect of the case, the motion was properly denied (*Morel v. Garely*, 16 *Abb. Pr.* 269).

II. The second matter in defense sought to be pleaded by the supplemental answer, viz., that plaintiffs had been adjudged bankrupts, and that the draft had not been proved as a debt against their estate (they being liable on it by reason of their endorsement), does not constitute any defense at all. *First*. If plaintiffs have not been discharged in the bankruptcy proceedings, they would be still liable on their endorsement of the draft. No allegation is made as to their discharge in the proposed supplemental answer. *Second*. It clearly appears that plaintiffs paid full value to *McWilliams & Co.* for the draft; they have, therefore, by the alleged conversion of it by defendants, lost actual property, and whether they are liable or not as endorsers, is immaterial. In this aspect also of the case, the motion was properly denied (*Morel v. Garely*, *supra*).

III. There is palpable laches on the part of defendants in delaying this motion until now. The complaint was verified August 28, 1874; the amended answer was verified November 25th, 1874, eleven months before this motion was made.

IV. Leave to serve a supplemental pleading is a matter of discretion, and that discretion may be exercised, and the motion for leave denied, on the above grounds, and also where the new matter desired to be

set up does not constitute a good cause of action, or a good defense (*Morel v. Garely*, 16 *Abb.* 269 ; *Holyoke v. Adams*, 59 *N. Y.* 233). And where the papers show a case for the exercise of discretion, the court, on appeal, will not interfere with the discretion exercised at special term (*Holyoke v. Adams*, 59 *N. Y.* 233).

BY THE COURT.—CURTIS, J.—The proposed supplemental answer alleges the insolvency of the makers, acceptors, and endorsers of the draft at the time of the alleged conversion. Also that the draft had not been actually paid by either of the parties thereto ; and that no claim against the plaintiffs' estate upon the draft has been proved in bankruptcy.

The suit is brought to recover damages for the alleged conversion of a chose in action. Where it is brought to recover for the conversion of a security, as in the present case, the measure of damages is the amount due upon it. But when the draft is of little or no value, by reason of the insolvency of the parties to it, or for any other cause, it is held that the defendants should be allowed to reduce its valuation by evidence of such facts, in mitigation of damages (*Potter v. Merchants' Bank*, 28 *N. Y.* 641 ; *Ingalls v. Lord*, 1 *Cow.* 240).

The defendant seeks to reduce its liability by showing that the draft was of no value at the time of the alleged conversion, by reason of the matters stated in the supplemental answer.

If the defendants were ignorant of these facts at the time their answer was made, and, after the discovery of them, proceeded without delay to apply for leave to plead them in a supplemental answer, then this application appears to come within the scope and terms of the 177th section of the Code.

The uncontroverted affidavit of the defendants' cashier alleges such ignorance at the time when de-

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fendants' answer was made, and also that he has only recently discovered the facts alleged in the proposed supplemental answer.

The affidavits, on the part of the plaintiffs, deny the alleged insolvency of the parties to the draft, but in view of the failure to show any payment of the draft at maturity, and other matters appearing in the papers, it can not be assumed that the facts alleged in the proposed supplemental answer are false, and that the application should be denied for that reason. On the contrary, it presents a question to be disposed of upon the evidence that may be presented at the trial of the issues.

The order appealed from should be reversed, with costs to defendants to abide the event of the action.

SEDGWICK and VAN VORST, JJ., concurred.

ANN ELIZA MITCHELL, EXECUTRIX, *et al.*, PLAINTIFFS AND RESPONDENTS, *v.* THE VERMONT COPPER MINING COMPANY, *et al.*, DEFENDANTS AND APPELLANTS.

ASSESSMENT UPON THE CAPITAL STOCK OF A CORPORATION BY THE DIRECTORS THEREOF.

SALE OF SAID STOCK, WHEN THE OWNER THEREOF NEGLECTS TO PAY THE ASSESSMENT.

Validity of sale depends upon the same being made strictly within the powers authorizing the same, namely: the law of the state wherein the corporation exists, and the charter and by-laws of the corporation.

A corporation can not enact or pass a by-law, or any rule or resolution for its government, except within the state under whose laws it is organized, and where it has a corporate existence.

Statement of the Case.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from judgment entered upon the decision of a judge at special term.

The plaintiffs' testator had been a stockholder in the Vermont Copper Mining Company, defendant. That company had sold, or claimed to have sold, the stock of the testator, for non-payment of assessment thereon. The defendant Ely had bought, or claimed to have bought, the stock, at the sale. The defendant Ely was also president, and the defendant Bicknell, treasurer, of the company. The plaintiffs demanded judgment that the defendants, the company and Ely, might be enjoined from consummating the sale, and from causing or permitting certificates of the stock to be issued, and that the defendants Ely and Bicknell be restrained from signing or issuing any certificate, &c., and that the pretended sale be annulled.

Nothing turns upon the form of the remedy or upon the validity of the assessments upon the stock. No special argument as to either was made upon this appeal.

The company was incorporated by the laws of Vermont. Its board of directors made an assessment of twenty cents upon each share of its stock. This assessment was part of an assessment of fifty cents, previously authorized, and thirty cents having been imposed. Both assessments were made under the following by-law of the company, viz.:

The directors shall have the power to assess the stock, not to exceed fifty cents per share, to furnish means for carrying on the operations, or paying the debts, of the company, and in case any stockholder shall neglect or refuse to pay such assessments, shall empower the treasurer to sell by public auction the shares of such delinquent, pursuant to section 12 of chapter 86 of the general statutes of the state of Vermont.

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This twelfth section provided, "That when any proprietor of any private corporation shall neglect or refuse to pay any tax or assessment duly laid or assessed by said corporation, agreeable to the by-laws thereof, the treasurer may sell by public auction the shares of such delinquent, under such regulations as the corporation by its by-laws may direct," and further, that "The excess, if any, after paying such tax or assessment and all proper charges, shall be paid by the treasurer to such delinquent on demand."

The board of directors adopted the following resolution: "Whereas an assessment of thirty cents a share upon the capital stock of this company was laid payable on February 15 last, and another assessment of twenty cents per share payable on August 8 last, and whereas said assessments have not all been paid, therefore *Resolved*, that the treasurer is hereby empowered to sell the stock upon which said assessment shall remain unpaid, at public auction, in accordance with the by-laws."

Afterwards, at a meeting of the stockholders in the city of New York, the following amendment was made to the by-laws:

"When the stock of any stockholder shall be ordered by the directors to be sold for unpaid assessments, such sale is to be made in the city of New York, by such auctioneer as the board shall direct, and between eleven and three o'clock of the day, and notice thereof to be given, at least ten days before the sale, to the delinquent shareholder, either personally or by mail, and also by publication for a like period in one or more of the daily newspapers of the city of New York."

It was proved that the company published the following notice, signed by the treasurer:

"The following described shares of the capital stock of the Vermont Copper Mining Company, standing in

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the name of the following parties, viz. (here was inserted the description of the shares belonging to several alleged delinquents, among them those of the plaintiff's testator), will be sold for the payment of assessments due thereon, by Albert H. Nicolay, at public auction, on Monday, September 17, at one o'clock, P.M., at the office of the company, at No. 191 Broadway (room 11). By order of the board."

The judge found as facts:

That on September 17, 1866, the said ten thousand nine hundred and forty-one shares of the said Samuel L. Mitchell of the stock of the said company were exposed for sale by the company, at their office, in the third story of the building, No. 191 Broadway, in the city of New York, for non-payment of the said assessment of twenty cents a share. Notice of such sale was publicly given in two of the daily newspapers of the city of New York, at least ten days before the sale; but no notice was received by the said Samuel L. Mitchell, either personally or by mail, nor is it satisfactorily proven that a notice was mailed to him. He, however, saw the publication before the sale. That no auctioneer was directed by the board of directors of said company to make such sale, and that no other action on the part of the said company or its board of directors in respect to said sale took place than as has been hereinbefore stated. That at such sale the whole ten thousand nine hundred and forty-one shares of stock of the said Samuel L. Mitchell were put up, and that the whole thereof were knocked down to the name of the defendant Ely, at one dollar and fifty-two and a half cents a share. That the defendant Ely was at the time the president and a director of the said company.

That prior to said sale the said Samuel L. Mitchell had objected to pay the said assessment of twenty cents a share upon his ten thousand nine hundred and forty-one shares of stock, but that he had stated to the

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said Ely, the defendant, that if he, as president of the said company, would assure him, the said Samuel L. Mitchell, that the accounts of the treasurer were correct, he would pay the said assessment, and that the defendant Ely had declined to give such assurance.

The learned judge further found as facts, that just before the sale took place, the plaintiffs' testator directed his check to be drawn for the amount of the assessments, and the same was by his further direction tendered, at the office of the company, to the defendant Ely, as president, in payment of the assessment; that the defendant Ely declined to receive the same, made no objection to the check or to its amount, but said that it would affect the sale to have the stock of the plaintiffs' testator then withdrawn, that he would buy in the stock, and the assessments could then be paid; that the stock was knocked down at the sale to the name of the defendant Ely, and that after the sale, he requested the agent who made the tender to inform plaintiffs' testator and to desire him to send the company the amount of the assessment; that notwithstanding this the said agent, as further directed, publicly protested at the sale against the sale of the shares belonging to plaintiffs' testator; that the defendant Ely did not pay for the stock, in whole or in part, and had not, down to the trial; that after the sale, and as late as the year 1868, defendant Ely requested the testator of plaintiffs to pay the assessment, and stated that upon the payment, the stock would be his; that at a meeting of the directors, at which defendant Ely was present, May 15, 1868, it was resolved that the stock of Mr. Mitchell (plaintiffs' testator), bought by Mr. Ely, at a sale for assessment, on September 17, 1866, "having been by him repeatedly offered to the company at the cost to him, we accept his proposition and the stock held by him subject to our order." This resolution was rescinded on August 16, 1868.

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The judge further found, "that it was not proved that any written note or memorandum was made or given in respect to the said alleged sale, and it was proved that no payment was made on account."

The judge found as matter of law :

1. That the purchase of the stock by Ely, a director and president of the corporation, was ineffectual to make a valid sale of the stock, unless the same should be adopted or approved by Mitchell, the stockholder, and that he not having approved of, adopted, or acquiesced in said sale, was not, nor are the plaintiffs bound thereby.

2. That to sell the said stock for the non-payment of an assessment, required that the sale should be made after due notice of ten days to the stockholder, and by an auctioneer directed by the directors, and that the said sale of September 17, 1866, was irregular for the want of such direction and notice.

3. That to make a valid and binding sale of such stock for the non-payment of an assessment, required a written note or memorandum signed by the purchaser, or by some other person by his authority, or a payment of fifty dollars on account, and that the purchase claimed by the defendant Ely was invalid for want of these requirements.

4. That to entitle the defendant Ely to claim the purchase of the said ten thousand nine hundred and forty-one shares of stock, required that within a reasonable time from September 17, 1866, he should pay for the same, inasmuch as it was upon payment by him alone that the said Samuel L. Mitchell would be entitled to receive the surplus over the amount of the claimed assessment.

5. That however the preceding propositions of law might be, the tender by the said Samuel L. Mitchell of the amount of the said assessment prior to the sale, put it out of the power of the said company to make a

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valid or effectual sale of the said ten thousand nine hundred and forty-one shares of stock.

6. That the plaintiffs, who are the executrix and executors of the said Samuel L. Mitchell, who, pending this action, has died, are entitled to judgment, and to the judgment herein ordered, and that it be and is adjudged that the defendants, the Vermont Copper Mining Company and Ely, be enjoined and restrained from taking any proceedings for the consummation of the said pretended sale, and from causing or permitting certificates to be issued for the said stock; that the defendants Ely and Bicknell be enjoined and restrained from signing or issuing any such certificates; that the said pretended sale be vacated and annulled; and that the plaintiffs recover of the defendant Ely the costs of this action.

Moses Ely, for appellants.

John E. Parsons, for respondents.

BY THE COURT.—SEDGWICK, J.—It was not contended that, under the statute of Vermont, there was a forfeiture of the stock upon non-payment of the assessments. It was tacitly conceded that the title of the delinquent would not pass from him until a sale had been made, by valid proceeding, under the statute, to a purchaser. The statute provided that any excess of the purchase price, beyond the assessment and all proper charges, should be paid to the delinquent. Down to the sale, the interest of the company was the amount of the assessment and the proper charges, and the company had not a title to the stock. Therefore the plaintiffs were entitled to the stock and the evidences thereof, unless the proceedings to the sale were those made by law, to divest the title, or if before a sale there was a tender to the company of the amount of the assessments and charges. It must be conceded

that the steps contemplated by law must be made in strict compliance with the law.

The validity of the sale depends upon compliance with the by-law of December 19, 1859, passed in the city of New York, in connection with the other by-laws and statute, or upon a construction of such other by-laws and the statute, apart from the by-law of December 19, 1859.

I think the learned judge was correct in deciding, that after the plaintiffs' testator (who was alive at the time of trial) had shown his general title to the stock at a former time, and that he had received no notice of the sale, either personally or by mail, the burden of proof was upon the defendants to show the taking of all the steps necessary for the passing of the title. The answer claimed that there had been a sale. Perhaps not so much was necessary to place the burden of proof upon the defendants. The defendants examined witnesses to show that notice had been given through the mails. The testimony was not positive or definite as to the particular notice to the plaintiffs' testator. It was of a general kind, that all the notices had been sent by mail to the delinquents. How much of the testimony, as to the particular notice, was an inference by the witness, and how much doubt, if any, there was in the witness's mind, was perceived by the judge before whom the witness was in person, and can not be estimated as well by an appellate court. His judgment on the subject must be final, as it would have been if he had given a greater weight to the testimony on this point. It is the fact, then, that the notice by mail, or personal, was not given, and the defect is fatal. The defect is not cured by the proof that the notice, as published, was seen by the plaintiffs' testator. He could rest upon the law that such a notice, alone, would not support a sale that would divest his title.

It is claimed, however, and correctly, that the by-

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law of December 19, 1859, was invalid as such, because being in the nature of a corporate act, it was passed in New York, out of Vermont, in which alone a corporate act would be valid. But in looking to the other by-laws made in Vermont, and to the statute of that state, we see that the sale was not authorized by them. There was a resolution of August 16, 1865, referring in part to the present assessment, "that the treasurer is hereby empowered to sell the stock upon which said assessments shall remain unpaid, at public auction, in accordance with the by-laws." The only by-law in evidence is, after giving the directors power to assess, that the directors "in case any stockholder shall neglect or refuse to pay such assessment, shall empower the treasurer to sell by public auction the shares of such delinquent, pursuant to section 12 of chapter 86 of the General Statutes of the state of Vermont." The statute itself was that "the treasurer may sell by public auction the shares of such delinquent, under such regulations as the corporation by its by-laws may direct." By the statute and by the by-laws no sale could be made without regulations for it being first made by the by-laws. There were no such regulations, and there could, therefore, be no valid sale.

I think also that the tender of the amount of the assessment as against the company and the defendant Ely, who had knowledge of the tender, availed to deprive the company of power to proceed (after it was made) to sale, even if the proceedings were regular. As to whether, in fact, the tender was made, we are content with the finding of the judge, supported as it is by one positive witness and corroborating circumstances. We have seen that the title of the stock was in plaintiff's testator, and that it was only charged with the right of the company to obtain by its sale the amount of the assessments and proper charges. The rights of the company would have been sat-

isfied and discharged by a payment. The rejection of the tender was not placed upon a deficiency of amount, or that it was not in money. Strictly there should have been an offer to pay the charges, and proof of ability and readiness to do it, upon being informed as to what they were. The necessity for this was obviated by the defendant Ely saying, among other things, that he would buy-in, for plaintiff's testator, and the assessment could be paid afterwards; that it would break down the sale to withdraw those particular shares, &c., &c.

This being true, however, if the judgment below could be supported on no other ground than that of tender, it should have provided that the tender should be kept good, and the plaintiff pay the money and interest and charges as a condition of relief. Equity would not require this, however, if the alleged or attempted sale was invalid for want of legal proceedings, or if, in fact, the sale was only colorable, and not, in fact, a sale as between the company and the defendant Ely. In neither case would any right of the plaintiff rest upon the making of the tender.

I do not think it expedient in this case to examine whether the mere fact of there being no contract of sale under the statute of frauds, binding the company and defendant Ely, would of itself give the plaintiff a right to claim that no sale had taken place or was invalid for that reason. But undoubtedly the learned judge was right in giving attention to the fact that the defendants had not proved such a contract. That fact with others, viz., the declaration before the sale that it would be bought in for the plaintiff's testator, the subsequent declaration that he might still have the stock upon the payment of the assessment, the resolution of the company, at which defendant Ely was present, afterward rescinded, that the stock of Mr. Mitchell, bought by Mr. Ely at a sale for assessment, "having been by him repeatedly offered to the com-

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pany at the costs to him, we accept his proposition and the stock held by him," and the non-payment by defendant Ely of the purchase-money—was evidence as to whether the sale that took place was meant to be more than a form, and whether either party had an intention to make a sale or purchase. These facts, too, might all be weighed on the question as to the tender. I do not, however, proceed in supporting the judgment upon the mere fact that there was no real sale. It is not necessary, and it may be that the judge below had no such question by itself before him. The judgment below can be affirmed on the invalidity of the sale under the statute of Vermont and the by-laws of the company.

In what has already been said, the propositions made in the strong argument by appellant's counsel have been considered directly or inferentially for the most part. He particularly urged that a tender to defendant Ely was not a tender to the company, because there was no evidence that he had charge of the fiscal concerns, and had no implied authority to receive money in payment of indebtedness. The proposition of law involved might be sound, yet we should consider that there was evidence that at the time of the tender the treasurer of the company was standing by, so that he was able to testify to what took place at the interview, although his remembrance of it was not the same as that of a witness for the plaintiff.

It is unnecessary to give attention to the argument, in relation to the conclusion of law by the judge, "that the purchase of the stock by defendant Ely, a director and president of the company, was ineffectual to make a valid sale of the stock, unless the same should be adopted or approved by Mitchell, the stockholder, and that he not having approved of, adopted, or acquiesced in said sale, was not, nor is the plaintiff bound thereby." An examination of the law on this

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subject is not required in this case, as we have come to the conclusion that the sale was invalid for other reasons.

The judgment should be affirmed with costs.

CURTIS, J., concurred.

WILLIAM NELSON, JR., PLAINTIFF AND APPELLANT, v. THE SUN MUTUAL INSURANCE COMPANY, DEFENDANT AND RESPONDENT.

MARINE INSURANCE.

A policy that states in the written portion the sum insured and the risk taken in the following words: "*Sum insured six thousand two hundred and fifty dollars, port risk in port of New York, upon the body, tackle, apparel, and other furniture of the good ship called 'The Confidence,'*" designates only such risk as is defined by the words "*port risk in the port of New York,*" and designates no risk upon any part of a voyage to be made by the ship.

Oral proof may be given to establish what the risk was, and to show what risks were covered under the words "*Port Risk.*"

The commencement of a voyage from the port of New York terminated the risk under such a policy.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from judgment dismissing complaint.

The action was upon a policy of insurance, which in form was a marine policy. The written part insured

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the plaintiff "at and from October 5, 1867, at noon, to November 5, 1867, at noon. Sum insured six thousand two hundred and fifty dollars, port risk, in port of New York, upon the body, tackle, apparel, and other furniture, of the good ship called 'The Confidence.'" Then followed the printed part, such as is generally used in a voyage policy, a valuation being inserted. The spaces left for the termini of a voyage were blanks. The clause commencing "Touching the adventures and perils, which The Sun Mutual Insurance Company is contented to bear," ended, "and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said vessel or any part thereof."

The answer averred that the loss did not happen during the continuance of any of the risks taken by the defendant, but after the ship, completely prepared for a voyage, had broken ground, and had commenced her voyage.

On the trial before a judge and jury, it appeared that on October 28, 1867, the ship was laden, manned, and equipped for a voyage to Glasgow, and was moored to a wharf or pier for the purpose of proceeding on her voyage. The moorings were cast off, and a steam-tug took a hawser from the ship to tow her and did begin to tow her out of the pier. Before the ship had been towed more than twice her length, she was caught by a strong tide, which swung the ship round so that she struck heavily on the reef near Jackson Ferry. She struck twice. Her keel and bottom were damaged, and for this the action was brought.

Against the objection and upon the exception of the plaintiff, the defendant was allowed to ask several witnesses, who were underwriters or officers of marine insurance companies, what was the meaning of the term "port risk" in the business of insurance. One answer was, "a risk on the vessel while in the port of

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New York, as distinguished from a voyage risk." The plaintiff gave testimony that he was a merchant, and accustomed to insure a great deal ; and to the question, " What do the words 'port risk in the port of New York' among underwriters and merchants mean?" he said it " covers all marine risks while the ship is in port." Other testimony on this point was given on both sides.

On the whole case the court dismissed the complaint, on the ground that the "port risk" as used in the policy had ended before the striking upon the reef, the ship then having begun a voyage.

George A. Black, for appellant.

Joseph G. Choate, for respondent.

BY THE COURT.—SEDGWICK, J.—If all the printed parts of the policy which specify the risks insured against are disregarded because they in words refer to a voyage, no voyage being described in the policy, then the only risk designated by the policy is such as is defined by the term "port risk." I learn from *Dows v. Howard Ins. Co.* (5 *Robertson*, 481), that on the continent of Europe, usage or positive enactment has defined all the perils insured against, and there is no need of inserting them in a policy ; but the judge giving the opinion said : "He had not been able to find any authority that in Great Britain and this country claims that any perils are insured against other than those enumerated in the policy, and any necessarily or usually consequential ones." If this be so, still it may be that when risks are not enumerated, but there is a general contract of insurance, the law has resources enough to determine as a question of fact or of law what it is that the contract insures against. It is, however, the universal custom to enumerate the

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risks. In this case, if we have to rely on the words "port risk," as a statement of the perils, we can not see in them the character of any peril, in the concrete. They describe nothing by which a ship may be damaged. There are sea risks, fire risks, danger from pirates, &c., in port, as there are on the high seas (Duval v. Commercial Ins. Co., 10 Johns. 278; Patrick v. Com. Ins. Co., 11 Id. 9). As "port risk" does not designate any of these in particular, if we reject wholly the printed enumeration of perils, the policy would be without any specification of perils insured against. To uphold all the parts of the contract, as far as can be, it is only necessary to read the whole of the policy, as limited by the written part "port risk in port of New York." Whenever the words, "this present voyage," "take upon itself in this voyage," &c., &c., occur, the word "voyage" should be deemed a "*falsa demonstratio*," not annulling entirely that part of the contract where it is, but, in fact, intended to designate the time and the circumstances embraced in the written part. Whatever is peculiar to a voyage, or particularly to be applied to a voyage, is to be disregarded. No voyage is described. Therefore it must also be said that the policy does not contemplate taking a risk upon any part of a voyage to be made by the ship unless it is included in the written part. This I believe to be a correct application of the cases in this state on this point (Grousset v. Sea Insurance Company, 24 Wend. 206; Leeds v. Mechanics' Insurance Co., 8 N. Y. 356; Frichette v. State Mutual Fire, &c., Ins. Co., 3 Bosworth, 190). The loss to the ship came from a peril insured against, so far as it was in its character a sea risk, *i.e.*, in the tide sweeping it against the rock. We can not, however, decide that the dismissal of the complaint should be sustained on the ground that the peril referred to was not extraordinary. This, if

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averred as a defense in the answer, was not alluded to upon the dismissal of the complaint. I am of opinion that the principle which apply to general insurance in voyage policies, viz., that the implied warranties call for the insured preserving himself against the ordinary action of the winds and sea, applies to such a policy as this, keeping, however, in view its subject-matter; and that a loss from the ordinary action of the tide is not to be borne by the defendant. But the plaintiff should have been apprised of the particular defense, as he might have given evidence that the tide or the risk was extraordinary.

We have said that "port risk" is not the designation of the intrinsic character of any peril likely to cause damage. To be sure, it is not impossible that a port might have a risk so peculiar to itself that such a risk would be so described among insurers and merchants. There could be no objection to giving oral proof of what this risk was, and to show that the words were used to designate it. There is no claim, however, by the defense that "port risk" was used in this way. The word port as here used refers to the extrinsic relations of the risk as existing while the ship is in port, not simply, however, as within the territorial lines of the port, but as using the port for the purposes of a port, up to the time when the voyage should begin, and to the time when the port is used to begin the voyage therein. The apparent object of the clause is to state, by the use of a "*generalissimum nomen*," viz., risk, what the insurers will bear the consequences of, and to exclude what risks they will not bear. The distinction, as the learned counsel for the respondent urged, includes "port risk" as different from "voyage risk," which is excluded. Such distinctions are usual in marine insurances. In time-policies there is often a provision that if at the end of the time the vessel is *at sea*, the insurance shall continue, &c. It

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is held in such cases, that if before the time expires, the vessel is ready for sea, quits her mooring, and endeavors to get out to sea, but is kept back by stress of weather, and comes to anchor, and after that suffers from a sea-peril, she, within the contract, is *at sea*, although, in fact, she is in a port or in a canal leading to the sea. Her being in the port is but an incident unavoidable on her part to her sea voyage (*Bowen v. Hope Ins. Co.*, and *The Same v. Merchants' Ins. Co.*, 20 *Pick.* 275, as cited in note 3 to p. 55, 2 *Parsons Mar. Ins.*; *Union Ins. Co. v. Tyson*, 3 *Hill*, 119; *American Ins. Co. v. Hutton*, 24 *W.* 330, *aff'd 7 Hill*, 321).

In this particular case the words "port risk" are connected with the words "in port of New York," and the main question is, when did the risk taken, end. The cases frequently determine when a risk ends, by considering when another begins, although the latter is not expressed in the policy, or *vice versa*. It is upon the natural supposition that risks are classified and words appropriate to the classes are used. When words used for one class appear in a policy, the risks indicated thereby are exclusive of the risks indicated by other words which have been generally employed.

A ship was insured "at and from," and warranted to sail, by a certain day. She did not sail until a later time. The question was, whether the premium paid could be recovered back, on the ground that no risk had ever attached under the policy. The court held, that there was a class of risks, indicated by the word "at" when the vessel was in port, distinct from the risk attached to the voyage, indicated by the word "from," and that although the breach of warranty prevented the attaching of the latter, there was an insurance while the vessel was in port, before the voyage (*Hendricks v. Commercial Ins. Co.*, 8 *J hn.* 1.)

The words "at and from New Orleans, Campeach, and Havana," although they may imply that the vessel may go from one to the other, as commencing a course of trade, do not imply that the vessel shall go "to" any of the ports as prescribing the end of the voyage (*Grousset v. Sea Ins. Co.*, 24 W. 207).

The words describing a voyage as "to" a port, continues the voyage beyond the territorial line of the port until the vessel is moored in the port; yet the word "to" implies literally no more than up to the port, and no further, and on the other hand, a "voyage from" a port includes that part of the voyage which, at its beginning, is in the port.

In the same way the words in the present policy are intended to exclude risks which would be taken upon a voyage "from" the port of New York. I therefore am of opinion, that as matter of law the court might hold that the commencement of a voyage terminated the risk under the policy.

On the other hand, I think the defendant was at liberty, if the court chose to allow it, to examine experienced underwriters or merchants to show how the word was used in the business of insurance, or rather what it meant, solely, however, upon the ground, that it is evidently a word formed for business and technical purposes. It is a composite word, which gets its form in a manner unusual in the formation of words in general. If it could be done, there was no objection to show that "voyage risk" and "port risk" were used distinctively. I think the court was bound to see that such was the use of the words "port risk" in the policy, and therefore in a sense it was unnecessary to examine witnesses; yet I think the testimony would be an assistance to the court in coming to a conclusion. I do not, however, think that the meaning of the words could have been left to the jury, inasmuch as the

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policy taken together fixed the meaning of the clause.

In so far as the witnesses, in endeavoring to define the term, gave a statement of the legal effect of the contract, or an opinion as to the time when the risk ended, the testimony was incompetent. The value of the testimony was exhausted when it had given the use and meaning of the words.

I am of opinion that the judgment should be affirmed with costs.

CURTIS, J., concurred.

MICHAEL B. FIELDING, PLAINTIFF AND APPELLANT, v. EUCLID WATERHOUSE, DEFENDANT AND RESPONDENT.

CO-SURETIES.

THEIR RELATIONS ; AND THE LIABILITY OF ONE TO CONTRIBUTE TO PAYMENTS MADE BY ANOTHER.

In this state, sureties, upon performance by them of their contract in regard to their principal, are entitled to the original evidences of debt held by the creditor, and to any judgment in which the debt has been merged, as well as to all collateral securities held by the creditor.

The right of the surety is not only that of subrogation, pure and simple, but a right to an assignment by the creditor.

Performance of the conditions of the suretyship discharges the principal obligation, so far as the existence of any interest of the original creditor in the same ; but the original debt is kept alive as between the creditor and debtor and the surety, for the purpose of enforcing the rights and interest of the surety therein, as against the debtor, his principal.

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A co-surety has the same responsibility for preserving and keeping alive securities, liens, and liabilities against the original debtor, in favor of his co-surety from whom he claims contribution, as a creditor has in behalf of sureties from whom he claims payment or fulfillment of the original obligation.

If a creditor releases or satisfies any security which holds against the principal debtor he must answer for the value of what he releases or satisfies.

The burden of proof, as to the value of the release or satisfaction, rests upon the party releasing or discharging.

In the case at bar, a judgment was satisfied and discharged against the original debtor by the consent and action of one of the sureties, who now seeks contribution from his co-surety for the amount paid by him, and the former should answer to the latter for its discharge and satisfaction, and the burden of proof as to its value rests upon the surety who discharged and satisfied the same.

By analogy it is right to apply the general rule of damages to this case, namely : that when the amount of value is made incapable of estimation by the act of the wrong-doer, he must be held responsible for the value that by any reasonable possibility the same may prove to be, as in this case, the full amount of the judgment that was satisfied.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal by plaintiff from order granting a new trial after verdict for plaintiff.

The action was by the plaintiff against the defendant, as co-surety for contribution. It appeared upon the trial that an action had been brought in this state by one Murray against one Harris and other defendants. In that action an attachment had been issued against the property of the defendants. Property was taken under the attachment, and to relieve it therefrom the present plaintiff and defendants became co-sureties in an undertaking made in pursu-

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ance of the Code, in the sum of seven thousand three hundred dollars, "that we will, on demand, pay to the above named plaintiff the amount of the judgment which may be recovered against the above named defendants in this action," &c. The plaintiff, Murray, in that action recovered judgment in the sum of five thousand eight hundred and thirty-five dollars. This judgment not being paid by the debtors therein, it was assigned with the undertaking to one Simms. Simms began an action upon the undertaking against the present plaintiff and defendant jointly. The present defendant was not served in that action. While the action on the undertaking was pending, the present plaintiff, Fielding, through a third person, requested one Beardon to come on to this city, in reference to the claim made. Thereupon said Beardon, plaintiff Fielding, and the attorneys of Simms had negotiations which resulted in an agreement to compromise for a less sum the judgment in the original attachment suit. In pursuance of this, the present plaintiff, Fielding, paid two thousand five hundred dollars; Beardon paid two thousand two hundred dollars; Fielding received a general release; the action on the undertaking was discontinued; and the judgment in the attachment suit was satisfied of record. The present defendant was ignorant of these matters. So much appeared by the undisputed evidence. The defendant gave evidence to show that at the time of payment by plaintiff there was a special agreement, which, in its effect, released the defendant from an obligation to contribute; but the court charged the jury, that if they found the defendant's version to be correct, they should find for the defendant. The jury found in favor of the plaintiff in one thousand two hundred and fifty dollars.

Before the case went to the jury, the defendant's counsel asked that the jury be directed to find for the

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defendant, on the ground that by the arrangement made, "judgment against the original defendants was satisfied, and so the right of subrogation of the sureties was lost." This was refused, and the defendant excepted. After verdict, defendant made a motion for a new trial, which was granted. This appeal is taken by the plaintiff, from this order.

Snead, Grimball & Rives, attorneys, and *E. Edward Rives*, of counsel, for appellant.

Man & Parsons, attorneys, and *John E. Parsons*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—The plaintiff and defendant were co-sureties for the payment of a judgment against their principal. By a negotiation between the judgment creditor, the plaintiff, and one Beardon, a compromise was agreed to, of which the plaintiff paid about one-half, and Beardon the other half, and thereupon, as was further agreed between them, the judgment was satisfied of record. The merits of this appeal are to be determined by ascertaining if this satisfaction of the judgment relieved the defendant from an obligation to contribute to the sum paid by the plaintiff. No other question was made upon the argument of this appeal.

Although *Copis v. Middleton* (1 T. & R. 229), and the opinion of Judge STORY (*Story's Eq.* §§ 499b to § 500, and notes), are to the effect that the surety has no right of subrogation to the debt or the evidences of the debt which he has contracted to pay, and therefore pays upon fulfilling his contract, the law in this state has settled for many years, that the surety, upon performance by him of his contract, is entitled to the original evidences of debt held by the creditor, and to any judgment in which the debt has been merged, as

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well as to all collateral securities held by the creditor. The right of the surety is not only that of subrogation, pure, and simple, but a right to an assignment by the creditor (*Marsh v. Pike*, 1 *Sandf. Ch.* 210; *Cheeseborough v. Millard*, 1 *Johns Ch.* 409; *Clason v. Morris*, 10 *Id.* 524; *Goodyear v. Watson*, 14 *B.* 481; *Eno v. Crooke*, 10 *N. Y.* 66; *Ellsworth v. Lockwood*, 20 *N. Y.* 98, and other cases). By performing the contract of suretyship, the principal obligation is discharged against the creditor, and is kept alive between the creditor, the debtor, and the surety, for the purpose of enforcing the rights of the last.

A co-surety has, of course, the same responsibility for keeping alive sureties in favor of his co-surety from whom he claims contribution, as a creditor has, in behalf of sureties (*Notes to Derin v. Earl of Winchelsea*, 1 *Leading Cases in Eq.*, 3 *Am. ed.* 156, *et seq.*). If a creditor releases or satisfies any security which he holds he answers for the value at least of what he discharges or satisfies (2 *Am. Leading Cases*, 394). If the release is of a nominal title, from a judgment, the surety is not discharged or the claim against him at all abated (*Blydenburgh v. Bingham*, 38 *N. Y.* 375). If goods are released from a levy, the claim of the party releasing, against the surety, is lessened by the amount of the value of the goods. The burden of proving what is the value of the thing released or the security discharged, is upon the party releasing or discharging (*Neff's Appeal*, 9 *W. & S.* 36, cited in 2 *Am. Leading Cases*, 405; *Hubbell v. Carpenter*, 5 *N. Y.* 171).

In the present case no chattel or real estate has been released from the judgment, but the judgment itself is discharged. The burden of proving the value of this judgment is upon the plaintiff, who should answer to the defendant for its being discharged. So far as I can see, it is not possible to estimate correctly what is or

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will be the value of a judgment through the time it can be kept alive. It is not without value; it may prove to be of the value of its nominal amount. By analogy it is right to apply the general rule of damages, that when the amount is made incapable of estimation by the act of the wrong-doer, he must be held responsible for the value it may by reasonable possibility turn out to be of (*Armory v. Delamirie*, and notes, 1 *Smith's Leading Cases*, 584; *Hart v. Ten Eyck*, 2 *Johns. Ch.* 62.) Is there any mitigation of these damages in the fact that the defendant, if he paid a contribution, would have his action against the principal? It would seem impossible to make such a use of this contingent course of action. It would be for the amount the defendant would pay the plaintiff after the plaintiff has proven what the amount should be by showing the value of the judgment. The defendant would not have the benefit of the judgment in question, with its peculiar character, or an equivalent advantage, down to the time he secured judgment in his own behalf.

The plaintiff did not satisfy the judgment, but the creditor did. The plaintiff is responsible for this, which took place in this state; for he did not demand from the creditor that the judgment should not be satisfied, but took part in an arrangement which had as an object the extinguishment of the judgment. The judgment was not satisfied by force alone of the payment made by Beardon. If it had been, the plaintiff would have been under no obligation to pay any part of it, and could not ask a contribution.

It is urged, however, that the judgment is kept alive in equity although it is extinguished at law. The case of *Burrows v. McWhann* (1 *Dess.* 409), is particularly referred to, and it is spoken of approvingly as an illustration in *Cuyler v. Ensworth* (6 *Paige*, 32). There was no attempt in that case to declare that the general

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consequence of satisfying a judgment at law could be avoided in equity by any decree short of setting aside the satisfaction. The complainants sought against administrators to establish a right to a priority of payment out of the estate. This right they would have if they could maintain a right under a judgment obtained against the intestate. They showed that being sureties for the payment of the judgment, they had paid a large part of it. The intestate having died, the administrators of his estate paid the remainder of the judgment, and obtained satisfaction. The complainants claimed that this act of the administrators should not bar their rights to priority as specialty creditors. The court gave the complainants rank as if they were specialty creditors. In effect the court determined what the rights of the complainants as sureties were at the time they paid the judgment in part, and considered that they had a right to be subrogated to the creditor's remedy through the judgment, and the court did nothing more as to the present point than decide that as against the inequitable or wrongful act of the defendant which produced a satisfaction of the judgment, it would deem the judgment alive. The full effect of this case does not relieve this plaintiff, for two reasons. 1. The defendant here is entitled to the legal effect of the judgment flowing from its character as a judgment, and not depending for any benefit that might be procured through it on a special judgment in equity reviving it or deeming it revived. 2. The plaintiff's act has led to the satisfaction, or permitted it; the damage to the plaintiff flows from that. There is no reason why plaintiff should be allowed to say that in his favor, to neutralize the consequence of his own act, the defendant should find his relief by a special action in which the satisfaction will be disregarded. The plaintiff should bear himself any burden he has created. It is not necessary to deny that if the defend-

ant was called upon to contribute in this action, he might, in a proper case, subject property of the principal debtor to his claim as if the judgment had not been satisfied. As we have intimated, such a benefit would only be in redress of an injury caused by plaintiff.

There is another reason why equity would not revive the judgment for any purpose. Equity observes the intentions of the parties. The presumption is that a surety, in acting in regard to securities to which he is entitled for his indemnity, intends to give that form to the transaction which is most beneficial to himself. If, however, the result of the evidence is to show that it was intended that the security should be finally discharged for all purposes, the surety, and no one claiming through him, can use the security as if it were not extinguished (1 *Leading Cases in Eq.*, 3 Am. ed. 155; *Harbeck v. Vanderbilt*, 20 *N. Y.* 395). Beyond doubt in the present case it was the intention of the parties that the judgment should be discharged for all purposes, legal and equitable, and the payment by Beardon of a part of the compromise as a consideration for the satisfaction, prevents as matter of law that the judgment should be revived.

It is, however, claimed that as the plaintiff paid but a part of the judgment, he was not entitled to an assignment. This view separates the action of the parties, and does not consider them as acting jointly and with a common purpose. In that view, however, we must suppose that Beardon's payment went to reduce the amount of the judgment. The rest would be between the plaintiff as surety and the judgment debtor as his principal, the proper security to the plaintiff for his payment as part of the compromise. Unless the agreement between the judgment debtor and the plaintiff was that the judgment should be entirely extinguished, the creditor could not have lawfully refused to assign

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the judgment as reduced for the plaintiff's indemnity.

I am of opinion that the order appealed from should be affirmed with costs.

CURTIS, J., concurred.

DAVID IRWIN AND TIMOTHY M. BRISTOLL,
EXECUTORS, &c., PLAINTIFFS AND APPELLANTS,
v. MATTHEW S. CHAMBERS, DEFENDANT AND
RESPONDENT.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

EXAMINATION OF JUDGMENT DEBTOR.

A judgment debtor can not be subject to several successive examinations unless the creditor can show specially that facts arising after one examination call for further examination.

The same rule applies to an examination upon a judgment recovered upon a former judgment, upon which these proceedings had been taken, and the defendant examined, &c.

In order to justify an examination under such a judgment, the judgment creditor must show specially that facts have arisen since the former examination that call for and justify another examination.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from an order of the special term.

Stephen B. Brague, for appellant.

Wm. G. Wheelwright, for respondent.

Opinion of the Court, by SEDGWICK, J.

BY THE COURT.—SEDGWICK, J.—The plaintiffs, under the usual affidavit, took out the usual order supplementary to execution, under § 292. On the return of this, an affidavit of the defendant was read, that on February 23, 1872, one Jackson recovered a judgment against defendant for three hundred and fifty-three dollars, in the common pleas. Jackson having died, these plaintiffs were appointed his executors. About June 29, 1875, an order supplementary to execution was taken under the judgment in the common pleas. The defendant was examined as to his property, and on that, the plaintiffs applied to the judge of common pleas for the appointment of a receiver "to take and receive the salary about to become due to this deponent for his services as clerk in the Bowery Savings Bank;" but that application was denied. On September 8, 1875, this action was brought upon the judgment in the common pleas, and on September 30, 1875, the judgment was recovered in four hundred and seventy dollars. Deponent had "a wife and two children dependent upon him for their support, and this deponent has no property, and is entirely dependent upon the salary received by him from the Bowery Savings Bank of this city for his maintenance and that of his family."

Ordinarily the opinion of the judge is not looked to to find the actual state of the case before him. The case must be looked to. This appeal must be an exception, in consequence of the disjointed way in which the case is presented. The learned judge, in his opinion, says: "Even if the Bowery Savings Bank has not yet paid the salary due to the judgment debtor, for personal services rendered during the month of October last, the same is necessary for the use of the family supported wholly by the labor of such judgment debtor." This evidently referred to the provisions of section 297.

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The order entered was upon the whole case as presented in the above entitled action. It is ordered, "that the proceedings for the examination of the judgment debtor, Matthew S. Chambers be dismissed without costs."

The notice of appeal refers on its face to this order, as an order made "vacating the order supplementary to execution."

An appeal must be heard upon the points made below, to which the attention of parties and the court was called and given. I infer, from the case, that the only point the judge was called to pass on was whether the salary due to the defendant by the Bowery Savings Bank should be directed to be applied by the defendant. It was the same as if it were agreed that the facts stated in the affidavit would appear upon the examination. No error was made by the judge in this matter. By section 297 the fact that earnings are necessary for the use of a family supported wholly or partly by the debtor's labor may be "made to appear" by the debtor's affidavit.

For that reason the order should be affirmed; but the learned counsel for the appellant claimed that he had a right, even if the judge properly declined to make an order that the salary be paid over, to proceed to an examination to disclose facts upon which a receiver of the defendant's property might be appointed.

The language of section 292 is clear and imperative that when an execution is returned, the creditor is "entitled to an order from a judge requiring the debtor to appear and answer," &c., &c. The substance of this right the creditor should freely enjoy. But the letter of the statute should not be forced into an application to circumstances not intended by the section. In the nature of the case, from necessity, the broad language should be limited by general princi-

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ples of law and equity made applicable to general provisions for procedure. When a party has had one order, the right is exhausted up to that time. No property appearing, it should not be presumed that such an insolvent has after that acquired property, so as to permit another order and still another to be made. If another order be applied for, either in the application for the order or in response to a motion to dismiss it, it should appear that there are circumstances which call for an examination into the existence of after-acquired property. At all stages the proceeding should appear to be for the purpose of the statute, *i. e.*, to obtain² property, and not for the purpose of having the examination only. The section is a summary proceeding in lieu of, or in addition to, the right to a creditor's action. Equitable principles must be applied in both cases.

The thing in this case which seems to make what has been said inapplicable to it, is that there never was a former order taken out in this action. It is true; but there was one taken out in the judgment which forms the cause of action here. There was an examination then, and an application to the judge for a receiver on or after July 8, 1875. And on September 8, 1875, this action was brought, and the amount of indebtedness increased by costs and compound interest. I do not say that any proceeding sanctioned by law is oppressive, but I must say, that the new action did not annul the full privilege the plaintiffs once had of obtaining the appointment of a receiver. If the order refusing one was erroneous, it would have been reversed on appeal in the general term of the common pleas. All the rights the plaintiffs could claim under the section have been given to them. As against the debtor, the plaintiff's resort to his new action should not deprive the debtor of exemption from unnecessary and harassing examination. There is no

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hardship in this or appearance of injustice. All the creditor need do is to show specially that subsequent facts call for further examination.

The order appealed from should be affirmed with ten dollars costs, and disbursements to be taxed.

CURTIS, J., concurred.

ALBERT JOURNEY, PLAINTIFF AND RESPONDENT,
v. JACOB B. TALLMAN, DEFENDANT AND AP-
PELLANT.

BROKER'S COMMISSION ON SALE OF REAL ESTATE.

In the case at bar the single ground for reversal of the judgment was that the plaintiff's case was not supported by a preponderance of proof, and the verdict was against the evidence.*

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal from judgment entered upon verdict, and from order denying motion for new trial.

James M. Smith, for appellant.

Butler, Stillman, and Hubbard, attorneys for respondent.

William Allen Butler, of counsel.

*NOTE BY REPORTERS.—Although the review by the court is upon the facts alone we deem the case worthy of a full report.

Opinion of the Court, by SEDGWICK, J.

BY THE COURT.—SEDGWICK, J.—The single ground upon which a reversal of the judgment is asked, is that the motion for a new trial should have been granted, inasmuch as the plaintiff's case was not supported by a preponderance of proof, and the verdict in his favor was against the preponderance of the proof.

I can not come to such a conclusion, but am of opinion that there was evidence which supports the verdict, and that such evidence was not a little in quantity or insignificant in its relation to the merits of the issue. The action was for broker's commissions. The defendant testified that he gave the houses to the plaintiff, and told him that he would pay him his commissions if he sold them. He gave the plaintiff distinct authority to offer the house at a certain price. The plaintiff engaged in an effort to sell, and went so far as to bring the defendant and the gentleman who afterwards purchased by an exchange, to a difference of two thousand dollars in cash only; the defendant wanted two thousand dollars more than the purchaser was willing to give.

There were several brokers who had such authority that if they had caused the sale that was made they would have been entitled to commissions. The question was—and it was fairly and with discrimination left to the jury—whether the plaintiff was the broker whose efforts had led to the sale. I do not think there would have been much trouble about deciding which of the brokers was entitled to a commission if the principals had not considered the expense of brokerage in the transaction. The property of the defendant was to be exchanged for other property owned by the purchaser. In this other property its owner had a broker, who was to be entitled to commissions from his employer if he succeeded in getting it exchanged for the defendant's property.

The evidence justified a construction which the

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jury could make. The difference between the parties was two thousand dollars. If the purchaser thought he was to pay no commissions, by the consent of his broker, and the defendant thought he would have to pay no commissions, because the broker he employed did not accomplish the negotiation entrusted to him, out of this difference would be removed one thousand seven hundred dollars.

The point to be proved, after employment was shown, was that the efforts of the plaintiff had resulted in the sale upon substantially the terms upon which he was to bring about the sale. The plaintiff, and witness produced by him, was present at the closing up of the agreement. On this point he made a *prima facie* case by testifying that the defendant said to him that the matter was carried through on the basis, that the defendant had given the plaintiff. This was enough to sustain the plaintiff's recovery, unless the defendant overthrew it by a preponderance of evidence that the jury might rely on. But as to such evidence it was the duty of the jury first to see that the witnesses who gave it had such a recollection of the facts that it should be relied upon, and next to give a correct construction of what was remembered.

There were three witnesses for the defense, the defendant himself, the purchaser, and the broker, who was in one phase of the matter the purchaser's broker. None of these, however, could state the terms upon which the bargain had been closed. The defendant did not state what they were. The purchaser testified that he did not remember what the basis was upon which he finally treated with the defendant. He did not remember what he got for his property. He did not remember what he paid for his property. The broker testified that he could not recollect what the terms of the transaction were; all he knew was that the price of the defendant's property was eighty-

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five thousand dollars. The most definite evidence on this point is of the following kind. The purchaser testified that he refused to close the sale upon the terms that the plaintiff brought him, and he never closed them upon those terms. The defendant testified "that there was no difference at the closing between the terms that I gave to the plaintiff and those I gave to the purchaser's broker. It was closed upon terms that the plaintiff said he could not accomplish. *I don't know how it came to be closed upon those terms.* If my recollection serves me right, the difference between the terms that it was closed upon and what he had tried to close it at was two thousand dollars. I stood out for two thousand dollars. I told them I could not make it any other way. I did not vary. I suppose the purchaser's terms and mine were the same when we closed. I told the plaintiff that I would close upon those terms."

This evidence did not furnish any facts on which the jury were bound to say that they destroyed the force of the *prima facie* case of the plaintiff, especially when the means of explanation by defendant were so ample.

There was evidence interspersed here and there which the jury must have noticed, in view of the doubt there evidently was in the minds of the defendant's witnesses as to the exact character of the closing up. The plaintiff testified that after his last interview with the defendant, before the bargain was settled, having received terms from the defendant, he went to the house of the purchaser. The purchaser said he had sent a man, meaning the person who was his own broker, into the defendant's houses. The plaintiff remarked, "This won't do. This is wrong." The purchaser then said, "You sit down. You will get your commission—you are entitled to your commission—you stay here," and some time after, told the

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plaintiff that the person who had acted as his broker "has carried it through upon the basis I proposed." After that, soon it was that the defendant made the admission referred to, that he had not made any different arrangement from what was proposed through the plaintiff.

It appeared from the testimony of the purchaser that his broker, in carrying the terms to the defendant, "added the price of his brokerage to the value of the property," *i. e.*, the property he was to give in exchange for the defendant's property, "not that I paid it, but what he would have received, so that I could get from the defendant enough to make me whole after I paid my broker." "I was doing the best I could for myself. The commission was added to the value of my property." And the purchaser had before testified, "I think my broker said he would charge no commission, none to me," and afterwards, "I had no understanding with him that he was to get his commission out of the defendant." The jury may, or at least was at liberty to, infer that the purchaser had been relieved from his broker's commissions.

On the other hand, there was testimony from which the jury was at liberty to infer that in the final closing up, the defendant had in that closing up considered that he might disregard the expense of any commissions, and could therefore abate eight hundred and fifty dollars from his terms. He testified that he never paid the gentleman (who had acted as the purchaser's broker, and who upon the trial, it was claimed for the defendant, had induced the transaction in question) as his broker, and, in fact, had not paid any brokerage. Although he did not know how it came to be closed upon the terms which, in fact, made the bargain, he was able to testify "that in the final closing up something was said about commissions."

The purchaser's broker was in much doubt, as a wit-

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ness, as to his status: "I have the impression that there was a trade of the house in Thirty-eighth street, *i. e.*, one of the pieces of property that the purchaser gave in exchange for the defendant's property. I presume that the purchaser has paid me, as his broker, for this portion of that transaction. The defendant has not paid me." "I don't know that I have not a claim" against the defendant. "I don't know about that; I have not made up my mind."

The jury must have considered what, in fact, from the circumstances in evidence, was "the something that was said about commission, to the defendant in the final closing up. They may have inferred that because the plaintiff was not present at that closing up, the parties bargaining thought he would not be entitled to commission, and that such a consideration was urged by the purchaser's broker, to show that the defendant might deduct that expense. As the plaintiff was not there to agree to that, his claim remained in abeyance, until he insisted upon it in this action. If the purchaser could give eight hundred and fifty dollars more because he paid no broker, and the defendant could deduct eight hundred and fifty dollars because he paid no broker, all of the difference in the two thousand dollars was disposed of excepting three hundred dollars. Under such a state of facts it can naturally be seen that after the plaintiff claimed his eight hundred and fifty dollars it was difficult for the parties to say whether the bargain was closed upon the terms carried by the plaintiff. I think the jury was at liberty to say that the plaintiff's efforts had accomplished what was the actual result.

These details have been given because the defendant has no further appeal on such a matter, and because the learned counsel for the appellant made a very zealous and ingenious argument. But I can not help thinking that the jury had enough evidence before them

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to support the views which have been here indicated. I only add that there were pieces of testimony given by the witnesses for the defense at variance with what has been here cited. In none of these cases, however, was the evidence not noticed such a modification of what has been noticed that the latter should not be considered by itself. On the other hand, the plaintiff was at liberty to ask the verdict of the jury between the two.

The judgment and order appealed from are affirmed with costs.

CURTIS, J., concurred.

ROBERT COCHRAN, PLAINTIFF AND APPELLANT,
v. CHRISTIAN GOTTWALD, AND DANIEL A.
MURPHY, DEFENDANTS AND RESPONDENTS.

In an action to recover the possession of personal property, where the answer alleges that as to a portion of the property the defendants renounce all claim or interest thereto, and offers plaintiff a judgment as to that portion, with costs, &c., and upon an issue as to the rest, which was tried before a referee, the referee erred in finding that the defendants were entitled to the return of all the property mentioned in the complaint *without exception*, or its value, fixed at five hundred and fifty-four dollars. The referee should not have included the value of the property in regard to which, by the answer, the defendant had renounced all right and interest.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Statement of the Case.

Appeal from judgment entered on report of referee.

The complaint was that "the defendants have become possessed of, and wrongfully detain from, the plaintiff the following goods and chattels of the plaintiff, that is to say," with a statement of the property; and the demand was for a delivery of the chattels, and damages for the detention.

The answer was a denial that the plaintiff had any property in the chattels specified in the complaint, excepting certain chattels specified in the answer, and as to that excepted property, viz: "skeleton road wagon, sleigh, two fur robes, and one black mare, defendants renounced all claim or interest to and in them, and hereby offer plaintiff judgment as to them, with the costs and expenses of re-possessing himself of them."

The answer further averred that defendant Gottwald recovered judgment against one Schiefferdecker, and execution was thereon issued and delivered to defendant Murphy, who was a marshal of the city, &c., and thereupon said Murphy levied said execution upon the property mentioned in the complaint, and that such property, with the exception stated, was the property of the judgment debtor.

The plaintiff, by the usual proceedings, had procured the delivery of the property, and the defendant demanded the return and re-delivery, with the exception as aforesaid, and damages.

On the trial before the referee, it appeared that the plaintiff claimed as mortgagee of Schiefferdecker. The mortgage was made on condition that the mortgagor pay the plaintiff a specified sum "on demand." It did not appear that before the levy there had been any demand of payment. The property when levied upon was in the possession of the mortgagor.

The referee found, that the defendant was entitled to the return of the property mentioned in the complaint,

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not making any exception ; and if the re-delivery could not be had, then judgment in the sum of five hundred and fifty-four dollars. In fixing the value of the property taken by the marshal, the referee included the value of one road wagon, one sleigh, and one black mare, being chattels which the answer renounced a right to.

A. J. Perry, for appellant.

Spencer L. Hillier, for respondents.

BY THE COURT.—SEDGWICK, J.—There must be a new trial, because it appears that the referee has given the defendant, as part of his damages, the value of articles which the answer admitted the plaintiff should have judgment for, and also has directed that the defendant should have judgment for the return of these articles. If it were not for the matter of damages, the error would not, perhaps, call for anything but a correction of the judgment. It is necessary, however, to have a correct assessment of the damages upon the new trial.

It may be as well, however, to say a word upon the merits. So far as the testimony now stands, there never had been any default on the part of the mortgagor. The indebtedness had not ever become due, and no demand for payment had been made. The mortgagor was rightfully in possession, and therefore had an interest which could be levied upon under the execution. If nothing further appears upon the new trial, the defendant will be entitled to a judgment for the return of the articles which he claims under his answer, or for their value.

As to that part of the claim which is admitted by the answer, the attention of the appellant's counsel is called to the last clause of § 244 of the Code. I do

not think § 385 is to be applied. It is not, however, meant to state here what is the proper course to be taken by the plaintiff.

The counsel for the defendant claims that there is no cause of action stated in the complaint, because no demand is averred. This assumes that the complaint states an action only for wrongful detention after a lawful possession. I am inclined to think that the position is correct. The complaint says defendants "became possessed of," not "wrongfully possessed of," and it does not charge that the defendants "took." If it was necessary to give a construction to the complaint, I think it would be that the defendants came into possession lawfully. This, however, can not be considered here, as cause of affirmance, because the trial took place without this point being raised, and it might have been cured by amendment upon the trial. The complaint sufficiently avers that the goods and chattels were the property of the plaintiff. Before a new trial, the plaintiff should determine whether he goes upon an unlawful taking or an unlawful detention, or both, and have the complaint so amended that his exact claim shall appear thereon.

For the reason first stated, the judgment should be reversed with costs to the appellant to abide the event, the order of reference discharged, and a new trial had.

CURTIS, J., concurred.

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CHARLES OFFINGER, *et. al.*, PLAINTIFFS AND
RESPONDENTS, v. DAVID R. DE WOLF, IM-
PLEADED, &c., DEFENDANT AND APPELLANT.

PRACTICE.

INTERLOCUTORY JUDGMENT.

Remedy of party aggrieved.

The Code has made no provision for an appeal from an interlocutory judgment. An appeal must be based upon a final judgment, and is governed by § 268 of the Code; or in a case where there was a trial and decision and an interlocutory judgment, the remedy of a party aggrieved is by a motion for a new trial under the same section (268), and such a motion must be based upon a case made, &c.

A party aggrieved by an interlocutory judgment, after a trial, can not be relieved on a motion to the court to vacate or modify such a judgment. He must move the court at general term for a new trial, &c.

Before CURTIS and SEDGWICK, JJ.

Decided February 7, 1876.

Appeal by defendant from a part of an interlocutory judgment and from an order denying defendant's motion to set aside or modify such interlocutory judgment.

Nelson & Cooke, attorneys for appellants; *Erastus Cooke*, of counsel.

Kissam & Embury, attorneys for respondents; *Benjamin T. Kissam*, of counsel.

BY THE COURT.—SEDGWICK, J.—So far as this appeal seeks to review the interlocutory judgment—for it

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is a judgment (§ 267), and not an order (§ 400)—it is controlled by § 268. The only relief in such case is a motion for a new trial, and that must be made upon a case or exceptions, settled and filed. There is a necessity that in reviewing an adjudication the appellate court should have before it, in an authenticated form, the matters upon which the court below acted. At any rate, such is the law. The Code has made no provision for an appeal, as such, from an interlocutory judgment. It must be from the final judgment.

And so far as the appeal is concerned, which is from the order denying the motion of defendant "to vacate and set aside the order or decree entered in this action," "and that the cause may be restored to the calendar for trial," that motion was not made upon any alleged irregularity or surprise (Rule 41). It, in fact, related to the merits of the action, and was an attempted appeal from the judgment, except, perhaps, so far as it involved a position of defendant, that in fact there was no trial of the issues. On this question of fact there were affidavits for the defendant which at the most showed there was no trial; but opposed to them were affidavits for the plaintiff which showed there was a trial. There were the findings and conclusions of the judge, which recited that the issues were brought on for trial before him, and there were the exceptions taken by the defendant himself, in the form appropriate to a decision made upon a trial. On the facts, it was clear that the judge who tried the case and who heard the motion was right in decreeing that there was a trial, and that the only remedy of the defendant to correct any error was by appeal from final judgment on a motion for a new trial, under § 268.

There was a motion made by the respondent's counsel, before the argument on these appeals began, that the appeal from the judgment should be dis-

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missed. This motion should be affirmed, with costs of ten dollars.

The order appealed from should be affirmed, with ten dollars costs, and disbursements to be taxed.

CURTIS, J., concurred.

WILLIAM MACPHERSON, PLAINTIFF AND RESPONDENT, v. WILHELMINA RONNER, DEFENDANT AND APPELLANT.

PRACTICE IN AN ACTION BEFORE A REFEREE.

A motion to set aside the report of a referee should be made before judgment is finally entered, for, if successful, it would prevent the entry of a judgment. It would be useless work to vacate and set aside the report and yet allow the judgment to stand.

In the case at bar, the referee allowed the plaintiff to amend his complaint on motion, giving the defendant twenty days to serve an amended answer, to which defendant objected and excepted, and refused to amend his answer, but afterwards went on with the defense on the trial, and after report and judgment thereon, he moved to set aside the report on the ground that the amendment so allowed by the referee was improper.

Held, that this motion was too late.

The defendant could have contested this question by a special motion to the court, at the time, for an order setting aside the amendment. In this way the matter could have been simply and expeditiously disposed of before the trial was concluded, if a motion in such a case was proper. It is too late to raise the question after the trial, report, and entry of judgment, except on appeal from the judgment.

The report having become incorporated with the judgment, can not be detached and considered apart from it. The report and judgment must stand or fall together.

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Before SEDGWICK and VAN VORST, JJ.

Decided February 7, 1876.

Appeal from order of special term.

The complaint in this action alleges that the plaintiff performed certain work, labor, and services for and furnished certain materials to the defendant in the erection and construction of a certain dwelling-house for defendant in the city of New York. The answer, among other things, alleges that the plaintiff made an agreement with the defendant to erect and finish a dwelling house for the defendant for a certain price; that the building was never finished, to the defendant's damage.

The issues were referred to a referee for trial. During the trial before the referee, the plaintiff asked to amend his complaint by adding after the words "New York" in the complaint the following, "and for work and labor done and materials furnished for and at the request of defendant, in repairing other houses of the defendant, and in building fences upon the defendant's premises." The defendant objected to the amendment on the ground "that it was new matter, that he was taken by surprise, and that the amendment was contrary to the statute." The objection was overruled and the defendant excepted.

The plaintiff was allowed to amend, the defendant to be served with a bill of particulars, and allowed twenty days within which to serve an answer. The bill of particulars was served, but was returned by defendant, who declined to serve an amended answer.

After the amendment, however, the trial proceeded before the referee, and evidence was given by the defendant, to meet the plaintiff's proof, in respect to the matters covered by the amendment.

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The referee reported in favor of the plaintiff, and upon August 3, 1875, a judgment was entered in favor of the plaintiff, upon the referee's report, and for the amount thereby awarded plaintiff.

In September following, and after the judgment, a motion was made to set aside the report of the referee. on the ground that the amendment of the complaint was improper.

No motion has been made to set aside either the order allowing the amendment or the judgment.

The motion to set aside the referee's report was denied, and from the order of denial this appeal is taken to the general term.

Mr. Burwell, for appellant.

Mr. Hall, for respondent.

BY THE COURT.—VAN VORST, J.—If the order made by the referee during the trial allowing the complaint to be amended was for any sufficient reason objectionable, and the defendant intended to contest it by a special motion, instead of proceeding with the trial, and giving evidence with respect to the subject-matter of the amendment, he should have at once applied to the court at special term for an order setting aside the amendment. There was abundant opportunity for this within the twenty days allowed the defendant to serve the amended answer, before further proceedings could be had before the referee.

In this way the matter could have been simply and expeditiously disposed of if a motion was at all proper.

I should say that it was too late to raise by motion an objection to the amendment after proceedings on the trial have been had under it, and the referee has reported, and judgment upon the report has been actually entered.

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By this final step the report has become incorporate with the judgment, and can not be detached and considered apart from it. The report and judgment must stand or fall together. To be effective, a motion simply to set aside the report of a referee should be made before judgment is finally entered ; if successful, it would prevent a judgment. It would be idle to set aside the report and allow the judgment to stand.

The defendant made his objection on the trial, at the time the amendment was asked for, and he excepted to the ruling of the referee on the subject.

He has taken an appeal from the judgment. If any error was made by the referee in allowing the amendment, the case on appeal will disclose it.

The court at general term, when the appeal is heard, will determine whether the amendment was within the power of the referee to order, or if discretionary, whether the discretion was abused. We are of opinion that the defendant having sought a review of the proceedings on the trial by appeal, and which seems to be the appropriate remedy, should be left to redress in that proceeding, if any be proper.

It is not necessary at this time, with an appeal pending, to express any opinion as to whether or not the amendment should or could have been allowed by the referee.

The order appealed from should be affirmed with costs.

SEDGWICK, J., concurred.

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THE PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFFS AND RESPONDENTS, v. LUCINDA
STARKWEATHER, ADMINISTRATRIX OF HENRY
STARKWEATHER, DECEASED, IMPLEADED, &c.,
DEFENDANT AND APPELLANT.

I. REVIVOR OF ACTION.

1. No change in law as to, since the *R. S.*, except an extension by the Code of a right to a revival, *before* as well as after trial or interlocutory judgment.

(a) *Test as to whether the action can be revived.*

1. Both under the *R. S.* and the Code the test is whether the cause of action survives.

II. SURVIVORSHIP OF CAUSE OF ACTION.—ABATEMENT.

1. TEST OF.

- (a) Whether the action might be originally brought against the executors.

2. WHAT CAUSE OF ACTION SURVIVES.

- (a) *Contract.* Where the cause of action is money due, or a contract to be performed, or gain, or acquisition by the labor or property of another, or on a promise, express or implied, by the deceased, there it survives.

- (b) *Wrongs.* Where the cause of action is for wrongs to property, rights, or interests, an action may be brought against the representative. § 1, art. 1, title 3, chap. 8, pt. 3, *R. S.*

Such a cause of action survives.

III. PEOPLE OF THE STATE OF NEW YORK, RIGHT OF ACTION IN FAVOR OF; AND SURVIVORSHIP THEREOF.

1. *Law of 1875, chap. 49 (Peculation Act)*, gives the people a right of action for any money or property owned officially by any municipal corporation which has *without right* been obtained, received, converted, or disposed of, and for any damages by reason of such obtaining.

(a) "*Without right*," *effect of the words.*

1. Notwithstanding these words, the action may be regarded as founded on an implied contract, and the people may waive the tort, and bring their action on contract; but even if it is

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essential under the act to bring the action in tort basing it on fraud or deceit, or on some other wrong, it would be a wrong to property, rights, or interests; and in either aspect, under above principles, *the cause of action would survive, and the People would be entitled to revive against the representative of a deceased defendant.*

Before MONELL Ch. J., and SEDGWICK, J.

Decided March 20, 1876.

Appeal from an order, heard at the March general term, 1876.

After issue joined, and before trial, the defendant died. A motion was made at special term to continue the action against his representative, which was granted, and the action was, by order, continued against Lucinda R. Starkweather, administratrix of the deceased.

The administratrix appeals from the order.

S. P. Nash, of counsel for appellant, urged:—
I.—The action is a statutory one, and therefore did not survive, especially as the act creating the right to sue does not embrace the personal representatives of the defendant (*Bank of California v. Collins*, 5 *Hun*, 12; *N. Y. Supreme*, 209). That the People had no right of action before the statute, is settled in *People v. Ingersoll* (58 *N. Y.* 1). The action provides that the People “shall have a right of action,” and enlarges, in respect to such right of action, the statutory limitation of six years to ten (*Laws of 1875*, 43, 4). The moneys sued for do not belong to the plaintiffs. The act does not transfer to the People the title or ownership of the money, the want of which was held in 58 *N. Y.* to be fatal to an action in the name of the

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People. The action is maintainable since the change of the law, not because the People has the title and ownership of the money any more than it did, but simply because the act says the People may bring the action.

II.—The action is framed as an action for fraud and conspiracy, and therefore does not survive (*Zabriskie v. Smith*, 13 *N. Y.* 322; *Wade v. Kalbfleisch*, 58 *Id.* 282). The question whether actions other than those arising on contract survive, depends upon the statute, 2 *R. S.* 447, § 1. "For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured against such wrong-doer, and after his death, against his executors," &c. By the statute the right of action is made to survive in favor of the "person injured," which, in this case, is not the plaintiffs herein. That the action is one for fraud is apparent from the allegations of the complaint, that Starkweather, knowing he had no right to receive the money claimed, represented that he had, and fraudulently agreed with the city authorities to pay him notwithstanding. These are substantially repeated in reference to several of the causes of action, and in reference to the first cause of action, it is alleged, in order to avoid the statute of limitation, that "the facts constituting the said fraud" were not discovered prior to six years before suit brought.

III.—But if the action is to be treated as an action on contract, and as surviving, the order to substitute the administratrix as defendant should have been on the terms of plaintiffs' striking out all allegations of fraud. Such allegations are purely irrelevant, if they do not change the character of the cause of action. The administratrix ought not to be put to the defense of charges of this character, if they are in no way relevant to plaintiffs' right of recovery.

Respondents' points.

Charles S. Fairchild, attorney-general, and *Francis C. Barlow*, of counsel for respondents, urged :—
I.—Section 121 of the Code provides for the revival of actions when the cause of action survives. There is no possible doubt that this cause of action does survive. Every cause of action survives which is brought to recover property of the plaintiff which has been received by the defendant. It makes no difference whether it was received or obtained by fraud or wrongdoing, or under a contract. The simple test is, has the act on which the action is founded increased the assets of the estate? It is only bare-naked torts, which have not added to the wrong-doer's assets, which do not give a continuing or surviving cause of action. The fact that the goods were obtained by fraud does not affect the case. It is enough to say that the defendant has got the plaintiff's money (*U. S. v. Daniels*, 6 *Howard* [*U. S. R.*] 11; *Cooper v. Crane*, 4 *Halstead* [*Law R.*], per EWING, C. J., 177; *Hambly v. Trott*, COWPER, R., per MANSFIELD, Ch. J., 374 and 375; *Wilbur v. Gilmore*, 21 *Pick.*, per MORTON, J., 252).

II.—The defendant insists that this is an action of tort, going upon the fraud and false representations. As above explained, it would make no difference if it were; but it is not. There are six causes of action. The only suggestion of fraud or deceit is at the close of the first cause of action, and that clause was inserted, not as a fact giving the right of action (as is shown by the fact that no such allegation is made in the other causes of action) but simply as a means of avoiding the bar of the statute of limitations which had run against the first claim.

III.—But if it were otherwise, and the acts done were charged to have been done fraudulently and deceitfully, it would not make this action an action for a tort. The acts set forth give a cause of action, if there be any, and their legal effect is the same whether

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they are charged to be fraudulent or not. Applying this adjective makes the facts neither more nor less efficient. It is mere surplusage. The point is that the acts themselves are not acts of fraud or deceit. Their character is not changed by the addition of an abusive epithet.

IV.—But even in cases where the acts are fraudulent, and acts of deceit, it does not follow that a statement of those acts (under our present system of pleading, where forms are abolished, and only a statement of the facts is required) constitutes an action of tort. Where your money is obtained by fraud and falsehood, you may either sue directly for the money, or for damages for the fraud. See *Artisans' Bank v. Andrews*, 26 *N. Y.* 298, and *DENIO*, Ch. J., 300, 301; Gen. T. Supreme Court in *Harway v. The Mayor, &c.*, 1 *Hun*, 628, and the cases there cited.

V.—And lastly, even if this were an action of tort, our statute expressly provides that it shall survive. See 3 *R. S.*, 5th ed., page 746, §§ 1 and 2. As to this statute, see *Haight v. Hayt* (19 *N. Y.* 464, and per *GROVER*, J., 467, 468, and *BROWN*, J., 474). The statute is also considered by the court of appeals in *Wade v. Kalbfleisch* (58 *N. Y.* 282), and in *Emerson v. Bleakley* (5 *Abb.* [*N. S.*] 361, 362). It was overlooked in *Zabriskie v. Smith*, 13 *N. Y.* 322 (see 25 *How.* 286), but the case in 13 *N. Y.* was a mere naked tort, which did not increase the assets of the defendant. See also *Fried v. New York and Central R. R. Co.* (25 *Howard*, 28).

VI.—The objections from the statute of 1875 (chap. 49) are equally absurd. The act does not create any cause of action, but simply gives to one civil division (the state) the right to sue for injuries done to another. That is its sole object. The cause of action would have survived to the city under the general provisions of law before referred to, and this being so, there is

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not the slightest indication that the law of 1875 was intended to restrict the remedy only to the original wrong-doer. Plainly, its only object was to transfer the right of suing to the state.

VII.—But the objection, under the law of 1875, would be equally unavailable even if the statute created the liability. Suppose it does create a liability against the wrong-doer, then, by the statute above cited, it may be brought against his executor. "For wrongs for which an action might be brought against a wrong-doer (and unless this law be unconstitutional, it certainly authorized an action against Starkweather), such action may be brought against his executor," &c. Those cases which hold that statute penalties do not survive, have no application. The incurring of a penalty does not increase the assets of the wrong-doer.

BY THE COURT.—MONELL, CH. J.—The Code (§ 121) provides that no action shall abate by the death of a party if the cause of action survive or continue; and the only question before the special term and upon this appeal is, whether the cause of action, as stated in the complaint, ceased with the death of the defendant.

Upon that question there has been no change in the law since the adoption of the Revised Statutes. The Code has merely extended the right to a revival of the action *before* as well as after trial or interlocutory judgment. Under the Revised Statutes, if the death of a sole defendant occurred before trial, the action abated, and a new action had to be commenced against the representatives.

But whether under the Revised Statutes or under the Code, the question is the same, namely, whether the cause of action survives.

This action is prosecuted under the authority of a

special statute (*Laws* 1875, chap. 49), which provides, that where any money or property owned officially by any municipal corporation has, without right, been obtained, received, converted, or disposed of, the People shall have a right of action for the same, and for any damages by reason of such obtaining, &c.

The cause of action specified in the statute is the *wrongful* obtaining of the money or property of a municipal corporation: and,—leaving out the *tortious* taking,—is a mere action for money had and received to the use of the corporation. And the only benefit of the statute is to enable the *People* to maintain the action, which previously to the statute could not be done (*People v. Ingersoll*, 58 *N. Y. R.* 1).

It is not of much importance to determine whether the *tortious* taking is or is not an essential element in the cause of action, except perhaps as it may affect the *status* of the plaintiffs. Money or property of a municipal corporation received by one of its officials or agents must be deemed to have been received and to be held by such agents to the use of the corporation, who, ordinarily, may maintain an action for its recovery without alleging a tortious taking. But the right of action being conferred by statute, it can not be extended beyond the cause of action specified in the statute, and probably must conform strictly with the statute.

The cause of action specified in the statute is one which does not cease with the death of the official or agent charged with having obtained the money of a municipal corporation. Whether he obtained it “without right;” or having obtained it rightfully, withheld it wrongfully, it was the money of his principal, held by him to his principal’s use, and as such became assets in the hands of his representatives.

Notwithstanding the words in the statute “*without*

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right," the action may be regarded as one founded on an implied contract, which arises from the relation of the defendant to the corporation, under which, having received the money or property of the corporation, the law will imply a promise to pay. And even, therefore, if a wrongful taking was an essential ingredient, there could be no good reason why the People might not, as in other cases, *waive* the tort, and demand a recovery upon the implied promise.

The test mentioned in the Revised Statutes concerning the abatement of suits (2 *R. S.* 387, § 3), that it shall not abate, if the action might be originally brought against the executors of the defendant, when applied to the cause of action upon or for which the People is authorized to prosecute, determines, it seems to me, the whole question.

Can it be doubted that for such a cause of action a suit might have been originally brought against the defendant's executors?

The distinction between actions which survive and such as die with the person is defined in *Hamblly v. Trott (Cowp. 371)*. Where the cause of action is money due, or a contract to be performed, or gain or acquisition by the labor or property of another, or on a promise expressed or implied by the testator, the action survives; otherwise, if it is a tort. And in *Franklyn v. Low (1 J. R. 396)* the distinction was preserved, and the survivorship of actions confined to actions *ex contractu* express or implied.

That decision, however, was before the Revised Statutes, to which I shall presently refer.

If the cause of action mentioned in the act of 1875 is such that it would survive against the representatives of a deceased defendant, then it remains only to see whether the cause of action as stated in the complaint is the same.

The allegations in the complaint are, in substance,

that the defendant was the head of the bureau for the collection of assessments in this city, clothed with the duty of collecting the assessments charged for the improvement of real-estate, and the paying over of the moneys collected to the city chamberlain. That, by ordinance, the collector was to receive as compensation a specified percentage of the money collected, but no moneys collected on any assessment could be retained on account of such compensation, but that such compensation should be paid on the requisition of the street commissioner to the extent of any money which had been collected and paid into the city treasury. It is then alleged that in sundry assessment-lists for improvements large amounts were charged to the city of New York, which were not such assessments as entitled the defendant to any compensation thereon. That notwithstanding, the defendant made bills or vouchers therefor, and obtained and received from the city his percentages thereon. That the officers paying such sums had no right or authority to pay, and did so in violation of law. All of which the defendant well knew. Fraud and deceit on the part of the defendant in receiving, and of the officers in paying, is also alleged.

To summarize—the action is to recover money paid to and received by the defendant, without any legal right to demand its payment, and to which he had no legal claim.

Such a statement of facts makes it a cause of action to recover money owned by a municipal corporation, which has, without right, been obtained without lawful compensation for the same being duly made, and is literally within the statute. And such a cause of action survives against the personal representatives of the deceased defendant.

But even if the fraud and deceit alleged in the

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complaint was an essential and necessary part of the cause of action, it would not change the result.

It is provided (2 *R. S.* 447, § 1) that for *wrongs* to property, rights, or interests, an action may be brought against the representative. And the second section explains the character of the wrongs intended by the statute.

That statute, it has been held, changed the law so far as property or relative rights are affected by the wrongful act (*Haight v. Hayt*, 19 *N. Y.* 464), and the meaning attached to the second section is, that the exceptions mentioned manifest the intention of the legislature, that *all other actions* founded upon tort should survive (*Fried v. N. Y. Cent. R. R. Co.*, 25 *How. Pr.* 285; *Wade v. Kalbfleisch*, 58 *N. Y.* 282). In the latter case the statute is construed to mean wrongs which affect property or property rights and interests, or, in other words, such as affect the estate.

The object of the plaintiff is to recover from the defendant money wrongfully obtained by him, and necessarily affects his property rights and interests, and upon his death necessarily affects his estate. Had the action been deferred until his death, I am quite clear that under the statute referred to (2 *R. S.* 447, § 1), it could have been maintained against his administratrix. Hence under the same authority it can now be revived.

The remaining reason urged by the appellants, that this being a statutory action, it does not survive, I can not appreciate the force of. The statute does not create the cause of action, but merely subrogates the People to the rights, either exclusively or co-equally, with the municipal corporation. In that respect, as well as in all other respects, the statutes and the principles of law applicable to other cases and causes of action apply to this case and govern it. This action

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is not penal nor of a penal nature; and, therefore, unlike the case of the Bank of California v. Collins (5 Hun, 209) to which we were referred.

I think the order below was right and should be affirmed with costs.

SEDGWICK, J., concurred.

ALFRED DE WITT, *et. al.*, PLAINTIFFS AND RESPONDENTS, v. S. CLINTON HASTINGS, DEFENDANT AND APPELLANT.

I. CORPORATION DE FACTO.

1. WHAT NOT SUFFICIENT TO ESTABLISH.

(a) The mere acting as a corporation, no matter for how long, is not of itself sufficient.

2. WHAT IS NECESSARY IN ADDITION TO SO ACTING.

(a) Either a charter or law which of itself creates, upon its acceptance, a corporation.

(b) Or, if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, that some of those regulations and forms have been observed, although others have been omitted.

1. How much must be done, or how much may be omitted, has not been decided.

1. *Sufficient compliance, what is; certificate*

(a) Where a statute provides that upon filing in a county clerk's office a certificate of a specified character, and a duplicate thereof in the office of the secretary of state, the persons who shall have signed and acknowledged the certificate, and their successors, shall be a body politic and corporate in fact and in law, *the filing in the office of the secretary of state* a certificate of the specified character, *without* any certificate whatever being filed in any county clerk's office, is a sufficient compliance for

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the purpose of, *with proof of user under it*, establishing a corporation de facto.

8. USER.

1. *Character of acts necessary.*

(a) Must be in their nature corporate acts, not speaking as much for non-incorporation as for corporation. Acts of individuals which would not be corporate acts if there were a charter will not be acts of user.

1. *What are not acts of user.*

(a) Those done before the doing of anything in the legal formation of the company, those not falling within the object for which the company was to be formed, and those done by persons not acting within the scope of any authority conferred by the parties associated together in the formation of the company.

2. *Against whom user will not raise a corporation de facto.*

(a) Not as against one who has *not taken any part* in the acts of user, when the contest is between third parties.

3. *Certificate of stock, the issuing thereof, effect of.*

(a) Not necessarily an act of user as against the party to whom it is issued.

(1) It is not such act of user when it is an isolated act, unaccompanied by any other use of corporate powers, and coterminous therewith there were acts from which a jury might find a disclaimer by the party to whom it was issued and who is sought to be made liable thereby.

4. *Articles of association naming a party as trustee, effect of signing by such party.*

(1) Only holds him to the obligations of an officer to carry on the corporate business, *provided* the articles are used to form a corporation de facto.

II. ESTOPPEL.

1. CERTIFICATE OF STOCK.

(a) Its issue to and receipt by a subscriber to the stock *does not estop him* from denying the incorporation.

(1) Such issue and receipt are to be looked upon *simply as bearing on the enquiry*, whether in fact corporate franchises were used.

Supra, under head "certificate of stock, the issuing thereof, effect of."

2. ARTICLES OF ASSOCIATION, EFFECT OF.

Supra head "articles of association."

III. MAXIMS.

1. *Locus penitentiae*, maxim applied,

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Before CURTIS and SEDGWICK, JJ.

Decided March 20, 1876.

Appeal from judgment.

The complaint charged that the Pacific Beater Press Company was a corporation under the laws of New York, organized under the general act for the formation of corporations for manufacturing, &c., purposes.

That at San Francisco, at the special instance and request of said corporation, the plaintiff laid out and expended for said corporation, in paying freight, cartage, wharfage, and dockage, upon a number of Beater presses, patterns, castings, &c., four thousand four hundred and six dollars and ninety-three cents, &c.

That the corporation was further indebted, for work, labor, and services done and rendered by plaintiff at the request of said corporation, in storing and taking care of certain Beater presses, &c., two thousand four hundred and eight dollars and thirty-eight cents.

That at the times aforesaid the defendant was one of the trustees of said company, and that the said company did not at any time publish or file any report of the amount of its capital stock and its existing debts, &c.

The answer was a general denial, with special averments that there was no such corporation, &c., &c.

On the trial the following facts were testified to: Several gentlemen met in New York on Dec. 27, 1864. Among them was the defendant and one Davis. The object was stated to be the temporary organization of a stock company. The defendant moved its name should be The Pacific Beater Press Company. The meeting adjourned, to meet again on January 3, 1865, to more permanently organize the said company.

On January 3, 1865, there was a meeting of the same

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gentlemen and others. There were nominations for president and for secretary and treasurer, for one year. There was not an election of officers.

It was resolved that Davis be nominated and appointed general superintendent of the affairs of the company on the Pacific side. It was resolved that the president and treasurer be authorized and empowered by the board, in the absence of a regular meeting of the same, to do anything which the board might lawfully do in and about the affairs of the company. It was further resolved that a stock assessment be made of ten per cent. on the entire capital stock of the company, for the purpose of forming a working capital of said company, for necessary expenses and for the immediate purchase of presses, patterns, and material, to be sent forthwith to California. It did not by subsequent testimony appear that this assessment was afterwards made or paid.

On the next day, January 4, 1865, six of the gentlemen acknowledged the execution of two certificates, such as in form are required by the acts for the formation of corporations, &c. Each certified that the subscribers had associated themselves together, under the statutes, &c., "for the purpose of manufacturing, using, and selling to others to be used, the hay-press known as the Harris Beater Press, or other presses accomplishing a similar purpose." The corporate name was given. The amount, viz. : one hundred and five thousand dollars, &c., of capital stock, was specified. The objects of said company "are to manufacture presses for pressing hay, straw, cotton, and other substances, for which presses are intended to be used in California, also to sell any such articles as may be pressed by said presses, which may be manufactured by them," &c. ; and also to sell to others rights of manufacturing presses, especially the press invented by John K. Harris, &c.

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The certificates further stated, "it is understood, that of the capital stock aforesaid one hundred and fifty shares of one hundred dollars each are to be issued, fully paid, for the conveyance to said company of the patent right to said Harris Beater Press in and for the state of California." Five directors or trustees, among them the defendant, were named for the first year. The gentleman named at the preliminary meeting as president was not named as trustee. It did not appear subsequently that any conveyance was made to the company of the patent-right, or that any stock was issued for a conveyance of it.

About this time a circular was printed, headed "Pacific Beater Press Company, San Francisco. Organized January 3, 1865." It stated names of officers, among them as president the gentleman nominated at the preliminary meeting, as secretary and treasurer the gentlemen nominated for these offices jointly on the same occasion, and as vice president the defendant. The circular stated the value and advantages of the Beater Press. The so-called secretary and treasurer composed and had printed this circular. There was evidence that this circular was looked at, at one of the preliminary meetings of the associates. The witnesses on this subject produced by the plaintiff had no recollection of a definite kind. There was no evidence that it was issued by the company or by any meeting of the associates. It was sent to California. There was no certain proof that the defendant had ever seen this circular. There was no evidence of the dates of these matters, but a jury might have found that they took place before February 25, 1865.

It appeared that the defendant received certificates of stock in the company, and gave a receipt for them on the stock-book, but when was not proved.

About this time it was learned by defendant and others that a portion of the patent-right which the com-

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pany was to use, had been conveyed, so that the company could get no title to that portion. The defendant offered to prove that upon learning of this he denounced the whole proceeding as a fraud, and upon the eve of his departure for California, on or about March 1, 1865, addressed a note to the so-called president, requesting him to inform Mr. Robbins, hereafter mentioned, that the defendant had resigned all connection with the "enterprise." Upon objection of plaintiff's counsel, this offer was rejected. It is uncertain from the printed case whether the court allowed to be read from a deposition of a witness who had knowledge of the transactions, the following, viz. : "All contracts were then agreed to be cancelled, and were cancelled so far as I recollect, and all stock and scrip issued were, when received, considered valueless," or whether it was not allowed to be read, upon plaintiffs' objection. The defendant testified that he immediately delivered one-half of the certificates received by him to C. P. Huntingdon, and deposited the other half for J. Collyer Robbins, "they being the parties to whom I sold all my interest." The defendant offered to show, by reading a deposition, that two stockholders, upon learning the facts, having taken stock, returned it to the parties from whom they bought, and received their money back. There was evidence which would have sustained a jury in finding that the act in relation to abandoning the association took place before February 22, 1865.

There was testimony that on February 22, 1865, the secretary of the company issued and delivered certificates of stock to Viele & Son, upon information received by the secretary that presses had been bought from that firm for the company. The secretary had no knowledge of the contract of purchase, and there was no evidence in the case as to it.

On February 25, 1865, one of the certificates above described was filed in the office of the secretary of state.

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No certificate was filed in the office of the county clerk. By whom or by whose direction this filing was done was not shown.

As appeared by two bills of lading in evidence, some hay presses and other packages were received on board of a ship for California, on January 12, 1865, and other merchandise of the same kind on board another ship on March 18, 1865.

The evidence showed that no meeting of trustees was held from January 3, 1865, until March, 1867. After the last date two meetings were called by the gentleman named as secretary, but no quorum appeared; the defendant was not present and no business was done or attempted. No other business of any kind was done for the association in New York; no capital was paid in, no by-laws were made. The only place of business of the so-called company was in the office of the secretary and treasurer. There was no certain evidence that the company had a sign upon the office. The only books of the company were the books containing the minutes of meetings referred to, and a book for the certificates of the shares of stock.

The only other business alleged to have been done for the company was in California. On the first Monday of January, 1865, Davis, who had been named as agent for California, went to San Francisco, where he lived. He either took to, or received in, California the circular referred to. He did nothing for the company down to August, 1865. In that month he received from the gentleman named as secretary a notice of the shipment of the merchandise specified in the bills of lading. No proof was given of the contents of that notice. The bills of lading referred to were of goods shipped by Simeon Leland (he being the gentleman named as president), to be delivered to J. C. Davis or his assigns, he or they paying freight. The consignee of the ships wrote to Mr. Davis personally that there

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were to his consignment certain merchandise, describing it, "shipped by Simeon Leland, New York." "It was only last night, after considerable inquiry, that we ascertained your address, and now write to you hoping thereby to save you the heavy expense which will be incurred by storing your large consignment," &c. Mr. Davis answered in writing, "I shall write to Mr. S. W. Mitchell to do the best he can in storing any consignment of presses per ship Bengal. You will please store them as ordered by him." There was no evidence of any statement between the parties that these shipments were on account of the company. According to the evidence of the consignees, the plaintiffs, there was a conversation soon after the letters were sent, in which Davis showed the circular and said that he expected to be in funds soon, either by sale of the presses or by funds which he expected to receive from the company east, and asked them to advance the freight and charges, that the stockholders were wealthy and would respond. Mr. Davis, as a witness for the plaintiffs, testified that the consignees requested him to call and pay freight upon the shipments, and his reply was he had no money belonging to the company, and could not pay the freight and charges upon the presses. Thereupon the merchandise was stored by plaintiffs, and the freight paid by them. The claim in this action was for the amount of the freight and the cost of the storage.

There was a defense in the answer of the statute of limitations. The court upon the trial, refused to submit to the jury any other question than that which arose upon the issues as to the statute of limitations. The jury found for the plaintiffs, and judgment was entered for plaintiffs. The defendant appeals from the judgment.

Gilbert & Smedley, attorneys, and D. C. Calvin

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and *F. G. Smedley*, of counsel for appellants, on the points considered by the court, urged, among other things :—I. The reception of the copy certificate under defendant's exception was error, especially as it appeared that the certificate had never been filed, according to the statute, in the office of the clerk of the city and county of New York (*Laws of 1857*, chap. 262 and its amendments; *Laws of 1848*, chap. 40, § 9). Under that act there was no authority to file a pretended duplicate until the certificate had been filed in the office of the county clerk (*Childs v. Smith*, 55 *Barb.* 45). This case was reversed in 46 *N. Y.* 34, upon a different point; but Judge FOLGER, at page 41, speaking of certain acts of the proposed corporation, says: "They did not show a full compliance with the statute nor establish that a corporation was duly formed." See also *N. Y. Car Oil Co. v. Richmond*, 10 *Abb.* 185.

II. It is insisted that the filing of the certificate, as required by the statute, is an indispensable prerequisite, and no amount of user will supply the defect. Such prerequisites are a substitute for a charter by legislative act. No amount of user will supply the place of a charter in the one case, or the making and filing the certificate in the other (*Uttley v. The Union Tool Company*, 11 *Gray*, 139). To establish a corporation *de facto*, it must be shown, 1st, a charter or some law by which the corporation might be created; 2d, *user* by the party to the suit of the corporate powers claimed (*M. E. Union Church v. Pickett*, 19 *N. Y.*, 482, p. 485). It is entirely clear that the action can not be maintained without proof of the incorporation, and of the company's liability to the plaintiffs; and proof that the defendant and his associates assumed to purchase the presses in question, and ship them to California, and that their agent procured their storage, while it may make them liable as partners or

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otherwise, can not create a corporation or make the defendant liable as trustee thereof. But it is submitted that the proof shows no such user as would help to create the corporation, if the defect were not organic. All user, to be effective, must follow the alleged defective organization, which must date from the filing of the certificate, February 25, 1865. And there was never a meeting held when a quorum was present or business was done after that time. And the only proof tending to show user is the pretended purchase by Leland, with the pretended stock of the company, in his own name, of the presses in question, and his shipment of them in his own name to an individual in no way legally representing the company.

III. The pretended purchases of presses by Leland were without authority ; there was no evidence of his authority conferred by the trustees, nor of their subsequent ratification thereof. By virtue of his office as president he had no such authority, and it could only be conferred by a vote or resolution at a meeting of the trustees. The acts of a corporate officer, acting without a special authority, are binding upon the corporation only so far as they are within the scope and ordinary course of the duties of his office (*Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 *Paige*, 127 ; *Boome v. City of Utica*, 2 *Barb.* 104 ; *Ashuelet Manf. Co. v. Marsh*, 1 *Cush.* 507 ; *Ridgway v. Farmers' Bank*, 12 *Serg & R.* 256 ; *Marine Bank v. Clements*, 3 *Bosw.* 600 ; *Dabney v. Stevens*, 2 *Sweeney*, 415, at page 426). It is insisted that Davis' superintendence was limited to the sale of rights to use the presses in question, and the receipt of the price (*Adriance v. Roome*, 52 *Barb.* 399 ; *Ang. & Ames on Corp.*, § 277 ; *Dabney v. Stevens*, 2 *Sweeney*, at page 429).

IV. Davis had no authority to charge the company with a claim of ownership, or admit his agency. That must be shown by the acts of the company through its

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trustees (1 *Hun*, 157; 1 *Paige*, 601; 23 *N. Y.* 439; 19 *Barb.* 310; *Abb. Dig. Corp.* 282, pl. 52, 53; Directors, 1 *Disney*, 285).

V. There is no evidence in this case to estop the defendant from denying the existence of the corporation in question. There is no evidence that the plaintiffs have acted upon the representations of the defendant, for he has made none. The only thing he did was to attend two preliminary meetings and sign a certificate of incorporation which never became operative; and it is submitted with entire confidence that the doctrine of estoppel has no application to such a case, and can not be made the pretext of imposing a liability in contravention of common law. Estoppel must be mutual, and only attaches where a party asserts a fact, the denial of which would injure the adverse party, who has acted upon the faith of it (*Welland Canal Co. v. Hathaway*, 8 *Wend.* 480; *Lawrence v. Brown*, 1 *Seld.* 394; *Irvin v. Conklin*, 36 *Barb.* 64). The case of *Buffalo & Alleghany R. R. Co. v. Cary* (26 *N. Y.* 75) does not militate against this principle.

Goodrich & Wheeler, attorneys, and *W. W. Goodrich*, of counsel for respondent, submitted a brief on the facts, and among other things urged as matter of law:—I. The defendant is estopped to plead that the Company was not duly incorporated by reason of the failure to file the certificate in the New York county clerk's office (*Eaton v. Aspinwall*, 19 *N. Y.* 119; affirming 6 *Duer*, 176; *Schenectady Pl. R. Co. v. Thatcher*, 11 *N. Y.* 102; *McFarlan v. Triton Ins. Co.*, 4 *Denio*, 392; *Mead v. Keeler*, 24 *Barb.* 20; *Abbott v. Aspinwall*, 26 *Barb.* 202).

BY THE COURT.—SEDGWICK, J.—The court took from the jury all questions in relation to the corporate character of the Pacific Beater Press Co., and

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decided them adversely to the defendant. The defendant claimed that the evidence showed that the company was not a corporation *de facto* or *de jure*. It was not the latter, beyond doubt, and the most favorable view for the plaintiff would be, that there was such a user of corporate functions and rights under color of a due organization, as a corporation, as to make what is called a *de facto* corporation. The cases hold that acting as a corporation, for any length of time, not being sufficient to make a corporation, it is necessary to show a charter or law which of itself creates, upon its acceptance, a corporation, or if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, that some of those regulations and forms must have been observed, although others have been omitted. How much must be done to make a colorable charter, or how much may be omitted, it has not been found necessary in the cases to decide. In the cases to which our attention has been called, the defect was of minor importance. Most of the steps had been taken, and it has generally been called an irregularity. What particular step in the process, designed by law to be complete wholly, is essential, and what may be deemed not essential, has not been decided. Judge SELDEN said, in *Methodist Epis. Un. Ch. v. Pickitt* (19 N. Y. 486): "The rightfulness of its existence not being in issue, of course evidence of any irregularity or of defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly irrelevant. If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required." In *Eaton v. Aspinwall* (19 N. Y. 119) the defect was not in the record, but was a want of a payment of a percentage of capital which the law required, before the incorpo-

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ration should be complete, and the court below gave importance to that. If the facts had been reversed, and the only evidence of an attempt to incorporate had been an organization of individuals, as if they were a corporation, and a payment of the percentage of capital as the capital of a corporation, I doubt if it would be deemed sufficient, even with acts of user, to make a corporation *de facto*.

The court further said, in the Methodist Episcopal Church v. Pickitt, that the degree of proof of user required depended, "to some extent, upon the nature of the incorporation and the law under which it is organized. Where no provision is made for any permanent evidence of the fact of organization, more proof of user would be required than where, as in this case, the essential steps by which the organization is accomplished are required to be made matters of record."

I have come to the conclusion that the filing in the office of the secretary of state, of the certificate of association, was sufficient, with due proof of user, to show the corporate character of the company for the purposes of this action. I hesitated much, because though no more is needed than mere color of an incorporation, the filing of such a certificate seems so insignificant in its character, under the statute, as hardly to be a single step towards the formation of a company. On its face and by itself, it is not anything called for by the statute. It was not, and it did not, profess to be a duplicate of a certificate filed in the county clerk's office. Yet, unless it is treated as if it were a duplicate, the proof is, that there was nothing done towards an incorporation, and there would not be any color even of existence under an incorporation. It is, however, such a certificate as would be filed if it were a duplicate, and if there was an attempt to make an incorporation; and its contents are so expressive of such a purpose on the part of the associates, that I deem it sufficient, if there

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had been proof of user under it. Evidently the acts to show user must in their nature be corporate acts, or such as would be corporate acts if the attempted incorporation had been perfected, and they must be unequivocally such. The corporation *de facto* must be proved. The testimony to prove it must be certain, not speaking as much for non-incorporation as for corporation. In substance, user consists in an enjoyment and exercise (although not rightful) of such corporate franchises and powers as would be given by the law to an association if the attempted organization had been perfected. The contrast to that is, that acts of individuals which would not be corporate acts, if there were a charter, will not be acts of user. The acts must at least appear to be the acts of the association not rightfully incorporated, and the acts must be such as would be within the objects of the incorporation, as stated in that part of the proceedings under the statute, that have been, in fact, taken. The law does not intend, in its due protection of third parties, to encourage the existence of associations assuming to be the grantees of the sovereign power of the state without authority of law. Third parties deal with associations which may be partnerships or may be corporations, and must depend upon the facts to show which they are, while they are not held to a close or critical examination of the efficiency of the steps taken to accomplish a legal incorporation.

And it should further be said that when the contest is between third parties, as in the present instance, and the incorporation has not been completed according to law, user will not make a corporation *de facto* against a person who does not take any part in their acts of user, and especially not against one who has done all in his power to prevent business being done under the illegal charter.

Excepting the issuing of certificates of stock to sev

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eral persons, and, among them, to the defendant, the acts relied upon to show user (at least, as the jury might have found, in those instances where the testimony was not certain) were acts before the first and only thing was done in the legal formation of a company, viz., filing the certificate in Albany, or were acts not shown by the plaintiff to be within the objects stated by that certificate, or were acts done by persons not shown to be acting within the scope of any authority conferred by the association.

The acts, at the meetings that took place before the certificate was filed, were not done in the exercise of any pretended franchise. On their face they referred to an incorporation afterwards to be formed. They were not ratified by any action in relation to them after the certificate was filed. After that no meetings were held, and no attempt to continue any organization. These acts could have had in themselves no tendency to lead third parties to believe that a corporation had been formed. The supposed purchase of the presses which were sent to California was not, indeed, proven upon the trial. Whether the purchase was made by the president as an individual, or representing the company, did not in any manner appear. Granting that he had power given by the association to make purchases for the furtherance of its objects, there was no proof that he bought the presses in the exercise of that power. He had full power to purchase for himself, and not for the company. There is no proof that the articles purchased were such as could be used for any of the objects stated in the certificate. Purchasing presses was not stated to be one of the objects. Certificates of the company's stock were issued as if in payment of a purchase for the company. That is the single fact to show that the purchase was by the company, but no authority had been given, before or after the filing of the certificate, to use the stock for such a purpose.

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These presses were not shipped to California in the name of the company. Therefore I think the proof did not show that the presses were the property of the company or bought for the company, and the alleged purchase does not show any use of corporate powers.

The gist of the cause of action is that the company requested the plaintiffs to pay freight on and to store the presses referred to. If there were such a request it was made by the mouth of Davis, in San Francisco. At the best for plaintiffs, he was then agent for the association. He had been present at a preliminary meeting in New York, and had there heard that he was appointed their agent for California, and at the time the presses arrived in California he had in his possession the circular, the particulars of which have been given, and we will assume that in some way he had the powers of a general agent. It should, however, be said that there was no proof that the association at any time sent the circular to him, or directed it to be sent, or intimated to him that he was to enter upon the exercise of any powers as agent, and he never did any business of the company. There was only a resolution to appoint him agent, not thereafter acted upon. The facts were, then, that the presses did not belong to the company (or at least the jury might have so found), were not bought for the company, were not shown to be suitable to the business of the company, or to further any of its objects. Therefore any dealings in respect of them by Davis were not within the scope of any authority given to him by the association. In what way the plaintiffs or Davis were led to believe that the presses were the property of the company is not proven. They both thought so, but not by reason of any communication from the association, or from any one who by the testimony even assumed to act for it. There was evidence that Davis had been advised of the shipment by the gentleman named at a preliminary meeting to be the secretary and

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treasurer. There was no testimony that this advice stated that the shipment was for the company. The bills of lading stated the shipment was by Leland individually. The notice of the consignees of the ship to Davis stated the same. The answer of Davis, in writing, to that notice did not refer to the company. If, then, Davis did not act in reference to any business of the company, what he did was not an act of user by the company. The plaintiff took the usual risk in dealing with an assumed agent in respect of his act, being one of user on the part of his alleged principals, or as creating a liability on their part.

We now consider whether the issuing of certificates of stock was an act of user under the facts of this case. The time when they were issued does not appear. Neither side attempted to show the time.

In *Black River & Utica R. R. Co. v. Clarke* (25 *N. Y.* 208), the judge giving the opinion said, that a subscription to take stock in a company was, in an action upon it against the subscriber, conclusive evidence of the corporate character of the company. The court said, "he is estopped by his own acts and admissions" from denying that corporate character. The court relied upon what was said by THOMPSON, Ch. J., in regard to contracts in general entered into with corporations, in *Dutchess Cotton Factory v. Davis* (14 *Johns.* 245), notwithstanding that this was questioned in *Welland Canal Company v. Hathaway* (8 *Wend.* 480). This decision was, in fact, also questioned in *Williams v. Bank of Michigan* (7 *Wend.* 541), by the chancellor. The court below, in *Black River, &c. v. Clarke* had made no ruling which called for a decision as to the conclusive character of the admission. The plaintiff below had given in evidence only the subscription paper, and the question was whether it contained enough evidence of the existence of the corporation to prevent a nonsuit. The subscription paper

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stated that the company had been formed, under the law of the state entitled, &c., and that the articles of association, with the necessary affidavits, had been filed. If this was a competent admission by the defendant of the existence of the corporation, the motion for non-suit was properly denied.

At the next term of the court of appeals, it decided *Buffalo & Alleghany R. R. Co. v. Carey*, 26 *N. Y.* 75. The action was upon a subscription by defendant's intestate to the stock of the plaintiff. The form of the subscription paper is not given. It was probably unlike that set out in *Black River, &c. R. R. Co. v. Clarke*. No opinion of the majority in the court of appeals was given, and the opinion of the court below is published in the report. In view of the deductions to be made from the dissenting opinion of Judge ALLEN, it is difficult to see on what grounds the court of appeals went in affirming the defendant's obligation. Perhaps the acts of user subsequent to the subscription were considered sufficient. But I can not see that the court of appeals decided that subscriptions estopped the subscribers from denying the incorporation.

In *Eaton v. Aspinwall* (19 *N. Y.* 121), while the judge delivering the opinion treated the fact as important that the defendant was a stockholder, he did so only in connection with the main ground, that there was sufficient proof of user. The defendant not only holding the stock, but receiving dividends upon it, furnished two considerations, 1st, it showed he participated in the acts of user; 2d, it illustrated the equitable ground of the rule, that user, under an imperfect organization, might, in favor of third parties, make a corporation *de facto*. I can not see that the court meant to declare as a rule, that a holding of stock formed an estoppel. If there were such a rule,

it was not necessary to show any other acts of user, or any attempt at an incorporation.

The issuing of stock should be looked upon, as bearing upon the enquiry, whether in fact it shows sufficiently that corporate franchises were used. If it were issued and received in connection with other corporate proceedings, purposely taken, to exercise corporate powers under an attempted organization, the evidence given by the issuing of the stock would be strong. In the present case, the issuing of the stock, and the receipt by the defendant of a part of it, were isolated acts not accompanied by any other use of corporate powers. All that was done in respect thereto was cotemporaneous with their acts, which the jury might have found formed a disclaimer on the part of the defendant, and even of the most of the associates, of any intention to take part in the further prosecution of corporate business. And at this point we see that, on general principles, there is a *locus penitentiae* at which it is not too late to stop, in order not to enter upon a violation of the law. Even if the purchase of presses had been made in behalf of the association, nothing else being done but the issuing of the stock, the manner in which that stock was dealt with, the jury might have found, was significant to show that no corporate privileges were meant to be used.

The defendant testified, that the business of the company not having begun, and, indeed, nothing having been done but the issuing of the stock to him, he expressed the determination to have no further connection with the affair, and handed the stock to some person with whom he had had some undisclosed bargaining. The whole evidence, however, was such that the jury might have found that this act was nothing but an endeavor to do what was just, in respect of the interests of such third person, but not as recognizing the existence of the corporation.

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The defendant having signed the articles of association which named him as trustee, only held him to the obligations of an officer to carry on the corporate business, provided such use was made of the paper as was designated by its character, viz., that it was to be used to form a *corporation de jure*.

On the whole case I think there were facts from which the jury would at least have had a right to find that there had been an intention to form a corporation, that before that was carried out, the defendant and others refused to proceed further, that thereupon certain individuals took up the affair and attempted without authority to act for the association, that, in fact, had no existence after the refusal, and that the defendant had done nothing which estopped him from denying the existence of the incorporation. On this ground, as well as on the other grounds, that the facts do not indisputably show for whose account the presses were purchased, nor that a purchase of such presses was within the objects declared in the articles of association that was filed, or that Davis was the agent of the supposed association in the matter in dispute, I think there should be a new trial, with costs to appellant to abide event.

CURTIS, J., concurred.

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GEORGE CAHEN, PLAINTIFF AND RESPONDENT, v.
JOHN R. PLATT, *et al.*, DEFENDANTS AND AP-
PELLANTS.

I. SALE, CONTRACT OF.

1. WARRANTY, EXPRESS.

1. *Breach, waiver of; estoppel.*

(a) If the vendee receive the articles, examines them, and retains them without raising any objection on the ground of non-conformity with the warranty, and without making any offer to return them, and without notifying the vendor to take them back, he can not raise the question of non-conformity.

2. *What does not constitute an express warranty.*

(a) "Approved standard quality," these words do not raise an express warranty.

1. It is another expression for a *merchantable article*.

(a) *Dorence v. Dow*, 57 N. J. 16, and *Day v. Pool*, 52 N. J., distinguished.

2. DAMAGES OF VENDOR ON REFUSAL BY VENDEE TO ACCEPT.

1. The measure is the difference between the contract price and the market value at the place of delivery.

1. *Place of delivery, what is.*

(a) When the contract was made at a certain place, say the city of New York, to which the merchandise was to be shipped from another place, and *delivery was to be made by the delivery of the invoices and bills of lading at the city of New York*, and payment was to be made at that city, the place of delivery is the city of New York.

1. That the merchandise is, according to usual custom, *shipped at the risk of the vendee*, does not alter the rule.

II. CURRENCY, IN WHAT, DAMAGES TO BE RECOVERED.

1. Where by the contract the *price is to be paid in the currency of a foreign government*, but damages for a breach are to be measured by the difference between that price and the *market value at a*

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place within the United States, where there are two kinds of currency, one of gold and one of paper, the latter being the universally adopted medium, the party recovering the damages is entitled to have them estimated on the basis of the paper currency, although its value at that place is capable of being estimated in the foreign currency.

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

Appeal by the defendants from a judgment entered in favor of plaintiff for nine thousand three hundred and thirty-nine dollars and twenty-two cents, upon the verdict of a jury.

The complaint alleges that in September, 1872, the defendants agreed to buy from the plaintiff eight thousand single and two thousand double boxes of glass, to be shipped from a Belgium factory, in October, November, and December, 1872, and, January, 1873, at a price fixed at a specified discount from a certain list of July 16, 1872, payable in the city of New York, in gold, on delivery here of invoice and bills of lading, the glass to be at the risk of the defendants as soon as shipped.

The answer admits all the allegations in the complaint except the amount of damages. It alleges, however, that the glass which was delivered was not delivered within the time called for by the contract, and was of a quality inferior to that agreed for, as not being of "approved standard quality," in accordance with the terms of the contract.

The learned judge below charged the jury, among other things, as follows: "You have nothing to do with the question which has been raised here as to whether the glass corresponded with the grade called for by the original contract between the parties, because no offer at any time has been made to return it, and no

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request was made to the plaintiff to take it back," to which defendants' counsel excepted.

The judge further charged: "The plaintiff, Mr. Cahen, testifies that the contract price for the glass was one hundred and one thousand four hundred and ten francs and ninety-six cents., and then, in the fall of 1873, from the time that Mr. Boyd returned from Europe, and told him that the glass could be bought at a less price in Europe, from that time up to January 1, the glass was worth sixty-six thousand one hundred and eighty-two francs and seventy-seven cents. in this market. Now, that is what he testifies, and that the difference between the price at that time and the price called for upon the contract was thirty-five thousand two hundred and twenty-eight francs and nineteen cents., which last sum, in currency amounts to about eight thousand dollars. That is what the plaintiff testifies to as the difference between the market value at the time of the refusal to receive the glass, and the contract price.

There has been testimony, in respect to which I shall not detain you, as to the way in which prices are estimated on glass, which is by a deduction from a fixed tariff. It is conceded that the six per cent. discount is an allowance for the difference between Belgium and English measurement, that the three per cent. discount is an absolute discount nominally for cash, and the fluctuating discount is the basis upon which the valuation is made. This valuation, testified to by Mr. Cahen, is made upon a basis of a fluctuating discount of fifty per cent. The defendants introduce a statement received from the plaintiff at some prior period, or about this period, made up by him upon a basis of forty-five per cent. fluctuating discount, which makes a difference of twenty-eight thousand six hundred and nine francs and ninety-two cents. calling the contract price the same, one hundred and one thousand four hundred and ten francs and seventy-six cents. and the

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value of the goods at that time seventy-two thousand eight hundred and one francs and four cents. ; this, in American money, as testified to by Mr. Hughes, to be five thousand seven hundred and twenty-two dollars in gold. Then there is another statement of value presented for your consideration. . . . If the refusal was prior to the period testified to by the plaintiff, and the market price was not as low as the defendant fixed it, then the defendants are entitled to the difference, whatever you may make that to be. But it is for you to consider the testimony as to the value, and to determine what was the market price at the time of the refusal to receive the glass ; and that amount the plaintiff is entitled to recover, with interest from January 1, 1874."

Defendants' counsel excepted.

Chambers, Pomeroy, and Boughton, attorneys, and *William P. Chambers*, of counsel for appellant, on the questions discussed by the court, urged:—I. The court charged the jury that the defendants not having offered to return the glass, nor having requested the plaintiff to take it back, the jury had nothing to do with the question as to the quality of the glass delivered ; that plaintiff was entitled to recover, and the only question for the jury was the amount of damages. (To this defendants' counsel excepted.) It is submitted that the foregoing exception was well taken. The court evidently regarded the contract between the parties as simply an executory contract. It is submitted that it was more: it was a sale with express warranty as to quality. The language of the contract is, "all to be of approved standard qualities" (*Day v. Pool*, 52 *N. Y.* 416 ; *Dounce v. Dow*, 57 *N. Y.* 16).

II. The defendants' counsel also requested the court to charge the jury "that, if the jury shall find that the glass delivered was, in respect to quality, con-

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formable to the contract, the plaintiff is entitled to recover, by way of damages, the difference between the price agreed to be paid by the contract and the market value at the time and place when and where the property, by the contract, was to have been delivered ;" and further, "that the place of delivery was at the point of shipment." The judge, on the contrary, charged that "the market price to be considered was that which was ruling at the city of New York at the time of refusal, and also charged, "the invoices were to be sent forward to the defendants here, and the goods were to be delivered here, and the payments to be made by bills drawn as specified in the contract, and paid in gold." Now, by the terms of the contract the glass was "to be shipped from the manufactory of Messrs. de Looper, Haidin & Co., in Gosselies, &c.," and the same was to be at defendants' "risk and peril as soon as shipped." The place of delivery, therefore, was at the place of shipment, and it was error for the court to refuse so to charge upon defendants' request, and to charge that "the goods were to be delivered here." The invoices and bills of lading were to be delivered here, but not the glass. The rule of law is, that the market value at the place of delivery, in cases of this kind, must be shown. "Where a place is fixed on by the parties as that for delivery, it seems to be well settled that the inquiry as to prices is limited peremptorily to that particular place" (*Sedg. on Dam.* (4th ed.) 317; *Story on Sales* (4th ed.) sec. 436, and cases cited in foot-note; *Gregory v. McDowell*, 8 *Wend.* 435; *Wemple v. Stewart*, 22 *Barb.* 154; *Lattin v. Davis*, *Lal. sup. to Hill & D.* 12; *Deifendorff v. Gage*, 7 *Barb.* 21; *Dustan v. McAndrew*, 44 *N. Y.* 72; *McNaughten v. Cassidy*, 4 *McLean*, 530.)

Man & Parsons, attorneys, and *John E. Parsons*,

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of counsel for respondent, urged, among other things:—I. As no objection is pretended to have been made to the glass until months after it was received, and as there never was any offer to return, or notice to take back, the defendants are precluded from alleging that the portion received was inferior (*Reed v. Randall*, 29 *N. Y.* 358; *Pike v. Nash*, 1 *Keyes*, 335; *Hargous v. Stone*, 5 *N. Y.* 73; *Sprague v. Blake*, 20 *Wend.* 61).

• II.—The glass, by the terms of the contract, was to be shipped to New York. The contract was made here. The delivery was to be made by the delivery of the invoices and bills of lading, and that was to be done here. The payment was to be made here. In such a case the rule of damage is as charged by the judge: “the difference between the contract price and the market value in New York at the time of the breach, for the same description of glass, upon the same terms for delivery and otherwise, as provided in the contract” (*Dana v. Fiedler*, 12 *N. Y.* 40; *Sedgwick on Damages*, 316; citing *Converse v. Prettyman*, 2 *Minn.* 229; *Dey v. Dox*, 9 *Wend.* 129; *Davis v. Shield*, 24 *Id.* 322; *Chitty on Contracts* (11th ed.), 621).

III.—The price was fixed in francs. The defendants insisted that the jury should render a currency verdict. It was proper that they should take the actual equivalent in currency (*Bank of Commonwealth v. Van Veck*, 49 *Barb.* 508; *Rodes v. Bronson*, 34 *N. Y.* 649, 653, 656; *Simpkins v. Low*, 54 *N. Y.* 173, 183-4; *The Vaughan and Telegraph*, 14 *Wall. (U. S.)* 258, 268).

BY THE COURT.—SPEIR, J.—The plaintiff delivered to the defendants under the contract all the glasses except four thousand nine hundred and twenty-four boxes, and those, which were delivered, arrived on March 10 and 21, May 12, and June 23, in 1873. These were paid for and examined in a week or two

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after arrival. The plaintiff's claim is for the difference between the contract price and the market price of the four thousand nine hundred and twenty-four undelivered boxes of glass. On April 15, 1873, the defendants wrote to the plaintiff to write by the steamer which was to sail the next day, to stop all shipments for them until further notice.

The defense is, that the shipments of the glass delivered by the plaintiff differed in quality from the glass called for by the contract; that the glass called for was known as "approved standard quality," whereas the glass delivered was a quality below that grade, and, consequently, the defendants were not bound to receive it.

It is to be observed that although the defendants' answer states that they notified the plaintiff that the glass already delivered was inferior, as claimed by them, there is no averment that defendants had either refused to receive, or offered to return any part of the glass delivered, or that they were ignorant of its quality at the time of its receipt.

On the trial, the defendants proved that the glass was examined as it was received, and its quality then discovered, that no objection was then made to receive it, and that no offer had ever been made to return any portion of it to the plaintiff, and that he had never been notified to take back any part. When the defendants wrote to the plaintiff to delay shipments, two of the four shipments had been received and examined, and the request to delay was not put upon the ground of the inferior quality of the glass.

It is not easy to resist the conclusion, from an examination of the evidence, and especially that of the defendant Boyd, that at this time, there being a falling market, that the defendants then had a sufficient supply of glass at the price agreed upon between them. The market continued to fall off, and

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in the summer of 1873 the defendants claim they notified the plaintiff of their objection to the quality of the glass, and the plaintiff replied it was impossible there should be any difference. Defendants' witness concedes that the plaintiff had never been shown any of the glass.

From the foregoing facts it is plain, I think, that the learned judge correctly charged the jury, "that they had nothing to do with the question whether the glass corresponded with the grade called for by the contract between the parties, and that the only question for the jury to determine was the amount of damages."

The point taken by the defendants' counsel is, that this was not only an executory contract, but it was a sale *with express warranty as to quality*, and the two cases relied upon to sustain his position are *Day v. Pool* (52 N. Y. 416), and *Dounce v. Dow* (57 *Id.* 16). I do not think a warranty can be predicated upon the contract proven in this case. The goods were to be of "approved standard qualities." When the defendants received the glass (and it was all received before any objection was made to its quality), the defendants themselves, in fact, approved the quality by receiving, examining, and retaining it without an offer to return any part of it, and without notifying the plaintiff to take it back. They have assented to the quality of the glass, and can not now revive that question. The retention of the property by the purchaser is an admission on his part that the contract has been performed. Besides, "approved standard quality" is only another expression for a *merchantable* article. The distinction between this and the cases referred to are very plain. In *Dounce v. Dow* (57 N. Y. 16), the court say, the contract was not merely for the delivery of iron classified and known as "XX pipe iron," and the iron of that designation

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and name, but that it "should be of a quality suitable and proper for use in said defendants' manufacturing business." Here was an express agreement or warranty that it should be of that designated quality. The defendants, immediately after ascertaining the quality of the iron when delivered, notified the plaintiff of the deficiency in the quality and character of the iron, and requested him to take away the balance which had not been melted and mixed with other iron after the test. The quality of the iron had to be submitted to a test in order to determine its tenacity and toughness, which was particularly valuable in the defendant's manufacturing business. It was this tenacity, toughness, and quality of the iron which the plaintiff had expressly warranted and agreed to deliver to the defendants. An attentive examination of the case of *Day v. Pool* (52 *N. Y.* 416) will discover, I think, an equally plain distinction. The cases which bear directly on the question before us are: *Reed v. Randall*, 29 *N. Y.* 358; *Sprague v. Blake*, 20 *Wend.* 61; *Hamilton v. Ganyard*, 34 *Barb.* 204; *Shields v. Pettee*, 2 *Sandf. S. C. R.* 262.

I can not see that the court has committed any error in his charge as to the rule of damages. The contract was made here, and by its terms the glass was to be shipped here. Delivery was to be made by the delivery of the invoices and bills of lading, and that was done here. Payment was to be made in New York. The defendants' witness, Dunham, proved that the usual course of business for a sale of glass was that adopted in this case. The glass is shipped at the risk of the vendee. The court properly left it to the jury to fix the time of the defendants' refusal to receive the goods, and to determine the market price at the time of refusal. The price was fixed in francs. It was proper that they should take the actual equivalent in currency (The Vaughan and

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Telegraph, 14 *Wall.* (U. S.) 268; *Simpkins v. Low*, 54 N. Y. 179, 183.

The judgment should be affirmed with costs.

SANFORD, J., concurred.

ELIZA M. SMITH, PLAINTIFF AND RESPONDENT,
AND ALSO APPELLANT, v. THE EXCHANGE
FIRE INSURANCE COMPANY, DEFENDANT
AND APPELLANT, AND ALSO RESPONDENT.

I. INSURANCE.

1. Policy insuring *a mortgagor of chattels* against loss on the mortgaged property, *loss, if any, payable to the mortgagee, issued after the mortgagee's title had become absolute at law*, by reason of the mortgagor's failure to fulfill the conditions of the mortgage, in neglecting to pay two installments of interest, and after the filing of a copy of the mortgage setting forth the mortgagee's interest in the mortgage as being the amount of the principal sum secured thereby, and said two installments of interest past due; the mortgagor never having taken possession, but the mortgagee having remained in undisputed and undisturbed possession of the property;

1. What is insured by the policy.

(a) *The entire property is*, and not merely the value of the property which might be realized upon sale over and above the amount due on the mortgage.

2. OVER-VALUATION IN PROOF OF LOSS. EXCESSIVE VALUATION, WHEN NOT PRESUMPTIVE EVIDENCE OF FRAUDULENT INTENT.

1. Where the articles valued were very numerous, and had been in prior use for greater or less periods of time, and their depreciation depends on the quality of the material

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when new, and the skill of the workmanship in its manufacture, and upon the wear in the use, very great *discrepancies* in the opinions of all the witnesses, as to the value of the several items, furnishes the best proof that the claimant's estimates, *though in many respects excessive*, can not be considered presumptive evidence of fraudulent intent.

8. VALUATION OF NUMEROUS ITEMS.

1. Gross and itemized, which to be taken.

(a) *The itemized valuation should be taken.*

4. DECLARATIONS BY MORTGAGOR.

1. *Made after issue of policy loss payable to mortgagees, are not admissible as against the mortgagees.*

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

This and two other actions were brought to recover upon policies of fire insurance issued by the several companies on the shafting, belting, tools, benches, fixtures, and machinery used in a rubber factory in Water Street, Brooklyn. The party insured by the policy is Fitzhugh Smith, son of the plaintiff, but by a clause inserted in the policies subsequently to their issue, the loss or damage was made payable to the plaintiff.

On September 9, 1867, Fitzhugh Smith executed a chattel mortgage on the property in the usual form, whereby the title to the property was absolutely transferred to the plaintiff upon the condition : "That if Fitzhugh Smith shall pay to her the sum of one thousand five hundred dollars, the interest to be paid on the same on the first days of January and July of each year, the same to remain for five years from date, if the interest is paid when due, then the transfer shall be void."

It was also provided in the mortgage that if default should be made in the payment of the said sum of

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money, the mortgagee was authorized to enter the place where the property might be, to take and carry the same away, and sell it in the usual manner, and until default should be made in the payment of the mortgage, Fitzhugh Smith was to continue in the possession of the property. The installments of interest which fell due on January 1, and July 1, 1868, remained unpaid when the policy was issued, and the plaintiff filed a copy of her mortgage in the office of the Register of New York, with a statement signed by her exhibiting her interest in the mortgage as mortgagee, including, in addition to the principal, the two unpaid installments of interest.

The plaintiff placed the value of the articles insured at eighteen thousand five hundred dollars, and the loss thereon at fifteen thousand five hundred dollars.

On the question of the value of the insured articles two witnesses were called for the plaintiff, one of whom testified to the value of each article, making an aggregate of twenty-two thousand nine hundred and forty-three dollars; the other testified that the damage to the property was beyond question in excess of thirteen thousand dollars. The defendant called several witnesses, one of whom gave three general estimates, one of six thousand dollars, one of eight thousand dollars, and one of ten thousand dollars; and in addition to this general estimate gave the value of some nine or ten items (some two hundred articles being covered by the insurance) which amounted to about eleven thousand dollars.

The case was referred. The referee reported in favor of the plaintiff, against the defendant, for the sum of one thousand five hundred and forty-five dollars and fifty-seven cents, besides costs, and judgment was entered thereon. Both parties appeal from the judgment.

Appellant's points.

W. K. Thorn, attorney, and J. Langdon Ward, of counsel for defendant, appellant, and respondent, submitted an elaborate brief in support of the proposition that plaintiff's estimate was a fraudulent over-valuation.

Charles M. Marsh, attorney, and of counsel for plaintiff, appellant, and respondent, submitted an elaborate brief in support of the proposition that there was no fraudulent over-valuation, and that the referee had adopted a wrong basis of valuation, and had not awarded plaintiff the amount of damages which the correct basis would entitle him to; and also made the following points: I. Before the mortgage became due the entire property could undoubtedly have been insured as the property of Fitzhugh Smith (*Van Deusen v. Charter Oak Ins. Co.*, 1 Abb. (N. S.) 350).

II. This mortgage never had become due. (1) There was no provision in the mortgage that the principal should become due if the interest was not paid. It provided only, "to run for five years from date, if interest is paid when due." It is substantially a mortgage without the interest clause. (2) If it were due, the plaintiff only had the right to so insist. She waived this right, and filed her declaration to that effect with the mortgage. The defendants, after this, by the very terms of their policy, recognize that her only interest was as mortgagee. (3) If, however, the mortgage became due it was only due on demand. This demand was never made. Until it was, the rights of mortgagor and mortgagee were as if it was payable at a definite future time (*Lun v. Orser*, 5 Duer, 501).

III. Even if the mortgage were due it would be no defense. The insured still remained liable for the mortgage debt. He still had an interest in the property to preserve it, that it might be applied to dis-

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charge his liability ; and his interest was not limited to the amount of cash he would receive over and above the payment of his debts (*The Buf. S. Works v. Sun Mut. Ins. Co.*, 17 *N. Y.* 401 ; *Strong v. Man. Ins. Co.*, 10 *Pick.* 43).

IV. The remaining exceptions may be considered together, the question being, whether statements and conversations of Fitzhugh Smith, the assured, are evidence against the plaintiff, to whom the loss had been made payable. (1) Fitzhugh Smith had at this time no interest in the policy. Such interest as he ever had, was transferred before the fire to plaintiff, by express consent of the defendant, evidenced by its agreement to pay the money to her. (2) Had Smith simply parted with his interest by assignment, to which defendant was no party, his declaration would have been inadmissible in its favor against plaintiff. How much less are they, then, in a suit by plaintiff, upon defendant's direct agreement with her (*Tonsley v. Barry* 16 *N. Y.* 497). (3) When a loss in a policy is made payable to a third party, statements of the insured are not admissible in evidence against the party beneficial interested in the policy (*Rawls v. Am. Mu. Life Ins. Co.*, 27 *N. Y.* 282 ; *Mullmer v. Guard. Mut. Life Ins. Co.*, 1 *Sup. Ct. [T. & C.]* 448).

BY THE COURT.—SPEIR, J.—The defendant raises two legal objections to the plaintiff's recovery, both of which I think have been properly disposed of by the referee. The first is put upon the ground that it, in fact, only insured whatever interest Fitzhugh Smith may have had as owner of the equity of redemption, and this was only the value of the property which might be realized upon the sale over and above the amount due on the mortgage ; that the plaintiff's title as mortgagee of the property has become absolute in law, because the mortgagor failed to pay the interest

which accrued on the mortgage. It seems to me the plain answer to this objection is that the defendant agreed to pay the plaintiff as *mortgagee* after the two installments of interest had become due, and after a copy had been placed on file with a statement of the interest she had in the property as *mortgagee*. There is no room for doubt what interest the company intended to insure.

The second objection that the gross over-valuation by the claimant of the various articles destroyed or injured warrants the inference of a fraudulent intent, is, I think, in this case wholly unfounded. The loss was sustained upon machinery, tools and stocks consisting of a very great variety of items mostly known as second-hand, which had been in prior use for greater or less periods of time. The depreciation would depend upon the wear in the use and the quality of the material when new and the skill of the workmanship displayed in its manufacture. The discrepancies existing in the opinions of all the witnesses as to the value of the several items furnishes the best proof that the claimant's estimates, though in many respects excessive, can not be considered presumptive evidence of fraudulent intent.

It appears from the record that the plaintiff's witnesses, two at least, have described with much particularity and minuteness the different articles of machinery and other property claimed to have been on the premises at the time of the fire. But the learned referee seems to think that their estimates are not founded on reliable data, that no opinion has been furnished by either of them of the *value* of the machinery at the time of the fire, and that the witness Birbeck's statements are of a general and vague character, and his examination of the property too superficial to justify him in attaching any great weight to the estimate he gave of the amount of the loss.

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On the other hand, the defendant's witness Davis appears from his disinterested manner to have justly acquired the confidence of the referee. The testimony of this witness was accordingly adopted by him exclusively as the basis of value. It is a general estimate of the whole property in mass, and not by items in detail. The witness gave three general estimates, first, six thousand dollars; second, eight thousand dollars; and third, ten thousand dollars. The latter sum was adopted by the referee as the entire value at the time of the fire, and he fixes the value of the articles which remained after the fire at four thousand dollars; consequently the loss sustained by the defendant on the old stock amounts to the sum of six thousand dollars, as found by the referee.

This witness had been an engineer and machinist for twenty years, and his then present business was in buying and selling all kinds of machinery new and second-hand. There can be no doubt, I think, of his qualification to ascertain the true value of second-hand or injured machinery. The question is, has the proper method been adopted by the court in determining the loss sustained by the company, in view of all this witness has testified to in the case? He says: "I visited the factory within two days after the fire occurred. . . I did not take a close, but only a casual, observation of the machinery, with a view of purchasing, such as to enable me to make a value. . . . After the fire I wanted to purchase the washing-machines and three of the grinders. . . I don't take into account the small hand-tools such as saws, but only the heavy machinery, such as calenders, heaters, washers, and shafting."

It appears there are some two hundred and forty items contained in the schedule unquestioned as having been upon the premises at the time of the fire. Many of these lighter articles could not be seen to be valued.

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They were covered up by the heavy machinery and debris, as abundantly appears in the testimony. Now, this witness, in addition to his general estimate, gave the value of some nine or ten items, which amount to about eleven thousand dollars, and there are six or seven items valued by the defendant's other witnesses, amounting to some six or seven hundred dollars besides. Assuming, then, that the value of the old stock after the fire was worth four thousand dollars as found by the referee, there was still more than a total loss. It may be added that this result corresponds with the general estimate made by the witness Birbeck. This witness had more than thirty years' experience as engineer and machinist, and made three visits to the ruins at the request of an insurance agent and adjuster, to examine the amount of loss. He was informed that the insurance amounted to thirteen thousand dollars, and being furnished with a schedule list of machinery and tools, reported that the loss was greater than the insurance, and he did not therefore have the ruins cleared out to examine all the items on the list. From a careful examination of all the testimony I have come to the conclusion that an error has been made in not adopting the proper rule in estimating the defendant's loss. Although the gross valuation made by Davis may have been satisfactory to the referee, it is clear if the itemized value of Davis himself and the other defendant's witness are in excess of that sum, there is error to the amount of that excess.

There is one exception taken by the plaintiff which deserves consideration. The witness Davis, on his direct examination, was asked whether he had since the fire any conversation with Fitzhugh Smith touching the value of this machinery. This was objected to, admitted, and exception taken. Fitzhugh Smith had no interest at this time in the policy. The defendant had agreed at this time to pay the amount of insurance

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to the plaintiff. It does not appear that Fitzhugh Smith had been examined at this time on the trial as a witness. He was afterwards examined. Nor was there any evidence that the transfer of the interest to the plaintiff was colorable, or not made in good faith. A clear legal transfer was shown upon good consideration, and negative evidence was made out of entire ignorance on the part of the plaintiff that any defense existed or was claimed to exist against the transfer. The supreme court has decided that declarations are inadmissible even where the defendant has been no party to the transfer, and that admissions of the mortgagee are inadmissible against his assignee (*Booth v. Swezey*, 4 *Seld.* 276; *Paige v. Cagwin*, 7 *Hill*, 361; *Tousley v. Barry*, 16 *N. Y.* 497). In this case the defendant made a positive agreement with the plaintiff. Statements of the insured are not admissible in evidence against a party beneficially interested, where a policy is made payable to a third party. Where a party whose declarations are sought to be proved is dead it affords no ground for the admission of such declarations. Here the party was living. It seems to me to be an attempt to prove a fact by the declaration of a person not a party to the action, and the evidence was hearsay and secondary (*Rawles v. American Life Insurance Co.*, 27 *N. Y.* 282; *Mulliner v. Guardian Mut. Life Ins. Co.*, 1 *N. Y. Supreme Court R.* 448).

The judgment must be reversed and the order of reference discharged.

SANFORD, J., concurred.

Statement of the Case.

KETTCHEN PUTZEL, PLAINTIFF AND APPELLANT,
v. ELLEN M. VAN BRUNT, DEFENDANT AND
RESPONDENT.

I. DEEDS.

1. DESCRIPTION, CONSTRUCTION OF.

(a) Intention of parties to be ascertained.

1. *How ascertained.*

(a) Not only by the language of the description in the deed itself, *but by reference to extrinsic facts, which may consist of cotemporaneous writings relating to the same subject, or prior deeds through which the title has come down and writings cotemporaneous therewith and circumstances relating to the premises described in them, and of the facts of undisturbed use on the one hand, and unqualified acquiescence on the other.*

(b). *Running to the centre, although bounded along the side of a highway.*

1. EASTERN POST ROAD IN THE CITY OF NEW YORK.

(a) "Thence 1,009 feet to a monumental stone marked 'K,' placed in *the easterly side* of the Eastern Post Road aforesaid, thence *along the easterly side of said road,*" contained in a deed of a part of the Turtle Bay Farm.

HELD,

upon above principles, that under the facts appearing in the evidence the deed carried the grantee *to the centre of the Eastern Post Road.*

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

This action was brought to recover the sum of five hundred and fifty-one dollars and fifty cents, the amount paid to the defendant, and an attorney for professional services in searching the title to premises,

Appellant's points.

under a contract for the purchase of a house and lot in Forty-eighth Street, in the city of New York, by the plaintiff of the defendant, upon the ground that defendant had no title to a portion of the premises agreed to be conveyed.

The making of the agreement is admitted, and the payment of the money. A good and sufficient deed of the premises was executed and tendered, which was refused for the alleged reason that the title to a portion of the premises was defective. The case was referred. The referee dismissed the complaint, and gave judgment for the defendant.

The plaintiff appeals from the judgment.

Nelson Smith, attorney, and of counsel for appellant, on the questions discussed by the court, urged :—I. While we do not admit that the deed from William H. Winthrop to Barclay conveyed that part of the premises in question lying in the Old Post Road, we refrain from making any point that it did not. We will venture to say that if the defendant could have made as good title to the premises as Henry Barclay had we never should have troubled the court with this suit. What we dispute in defendant's alleged title is, that the deed from Henry Barclay to Samuel Thompson did not convey any part of the premises which were formerly within the limits of the Old Post Road. This deed conveys a piece of land lying on the easterly side of the Old Post Road, and by its express limitation to the easterly side did not embrace the road to its centre, upon the well-settled and long-recognized principle that where a deed conveys land lying upon a road, and by its terms the land conveyed is described as being upon the side of the road, and the boundary is limited to the side and along the side, instead of running to the road and along the road. then. and in such case, no part of the

Appellant's points.

land within the road is embraced in the conveyance. This principle is well settled, and is decisive of this case (*Jones v. Cowman*, 2 *Sandf.* 234; *Van Amrige v. Barnett*, 8 *Bosw.* 357; *Whitman v. Law*, 34 *Barb.* 515; *Anderson v. James*, 4 *Robt.* 35; *Child v. Starr*, 4 *Hill*, 369; *Halsey v. McCormack*, 13 *N. Y.* 296). In such a case there is no distinction between city and county roads (*Hammond v. McLoughlin*, 1 *Sandf.* 323; *Anderson v. James*, 4 *Robt.* 35). Nor does the grant "of all the right, title, and interest," "appurtenances, &c.," pass the title to the road. These only pass an easement; no title to land can pass except that expressly described (*Jackson v. Hathaway*, 15 *Johns.* 447). The deed from Thompson to Lawrence is open to the same objection, and does not embrace any part of the road.

II. The defendant does not pretend to have any record or paper title to that part of the premises in question lying within the limits of the Old Post Road unless the easterly side of the road was covered by the deed from Barclay to Thompson, and from Thompson to Lawrence. For it is conceded that a portion of the premises in question are situate on what is known as the Old Post Road.

III. There is no evidence that either Barclay or Thompson or Lawrence ever entered into possession, or claimed to enter, or have ever taken possession, of any part of the land situate within the limits of the Old Post Road; and their deeds not embracing the road, even if there were evidence—which there is not—that they entered into possession of the land conveyed to them, still that possession could not avail them or the defendant anything, because of the well-known presumption of law that when a person enters into the possession of land under a deed, his claim of title is limited to the premises described in the deed (*Bowie v. Brake*, 3 *Duer*, 35).

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IV. The only evidence from which the defendants' counsel could pretend a title to be established is that which tends to show that in 1859 one Fox was in possession of the premises, living in a small shanty built thereon. If this could be relied on, it only shows possession for about fourteen years. Possession for that length, even though under a claim of title, being short of that prescribed by statute, is of no effect whatever. The rightful owner—as appears by the evidence—of that part of the premises in question located in the Old Post Road, is Henry Barclay. And if Fox were actually, as Mr. Sexton states, in possession of the premises, the presumption would be, in the absence of proof, that he, Fox, was in under Barclay, and not under any person who was not the owner of the premises (*Fosgate v. Herkimer Man. Co.*, 9 *Barb.* 287; *Jackson v. Thomas*, 16 *Johns.* 293). But there is no evidence when Fox entered, nor how he entered. The presumption would be that he was a mere squatter, not entering or claiming under anybody.

V. We confess that we do not comprehend the force of reasoning by which the referee makes the reservation of the piece conveyed by Barclay to Gates a ground for holding that such deed, on account of such reservation, is to be enlarged or extended so as to convey to Thompson any part of the easterly half of the Old Post Road. It is the first time that we have ever heard it suggested that the reservation of any part of land embraced in a description could be said to operate to enlarge the description. Had the description in this deed from Barclay to Thompson stopped where the reservation began, it is difficult to see, upon the authorities, how it could be said to embrace any part of the Old Post Road, it being expressly limited to a line wholly on the easterly side of the road. The

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authorities cited by the referee, viz., *Luce v. Carley* (24 *Wend.* 451), and *Bissell v. N. Y. Central R. R. Co.* (23 *N. Y.*, 61), do not sustain any such proposition. In *Luce v. Carley* (24 *Wend.* 451), the premises were bounded by a monument standing on the easterly bank of the river, from which the course was given as running "along the river as it winds and turns" to another monument, and the court held that the grantee took usque ad filum aquæ, but had the deed given the course from the monument as running along the easterly side of the river as it winds and turns, instead of along the river, the grantee would not have taken to the middle of the stream. The case is an authority in favor of the plaintiff, and shows the converse of what it was cited by the referee to show (*Child v. Starr*, 4 *Hill*, 269; *Van Amrige v. Barnett*, 8 *Bosw.* 357).

George W. Palmer, attorney, and of counsel for respondent, among other things, urged:—I. 1st. The presumption of law is that every owner of land bordering upon a road, owns to the centre thereof, unless the language of the deed under which said owner claims the title, by precise language, excludes the road (*Child v. Starr*, 4 *Hill*, 382; *Hammond v. McLachlan*, 1 *Sandf. S. C. R.* 341; *Herring v. Fisher*, *Id.* 344; *Dunham v. Williams*, 36 *Barb.* 136; *Gedney v. Earl*, 12 *Wend.* 98; *Woolrych on Ways*, 5, 6; *Bissell v. N. Y. Central R. R.*, 23 *N. Y.* 61). 2d. "The construction ought to be made on the entire deed, not on any particular part of it; and such construction should be given that, if possible, every part of the deed may be operative. If a deed can not operate in the manner intended by the parties, such a construction should be given that it may operate in some other manner so as to effectuate the intention" (*Angell on Highways*, 298; *Moore v. Jackson*, 4 *Wend.* 58; *Jackson v. Blodget*, 16 *Johns.* 172; *Long*

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Island R. R. Co. v. Conklin, 32 *Barb.* 381). 3d. "Also, where it appears to be the intention of the parties that the land shall pass, the form or mode of conveyance is not material, but the intent should be effectuated by every legal means" (Jackson v. Myers, 3 *Johns.* 388; French v. Carhardt, 1 *N. Y. (Comst.)* 96). 4th. Again: "Every uncertainty is to be taken in favor of the grantee, and every presumption. The burden is on the plaintiff to show the road was excluded." (Bissell v. N. Y. Central R. R., 23 *N. Y.* 61; Adams v. Saratoga R. R. Co., 11 *Barb.* 414; Luce v. Carnley, 24 *Wend.* 451; Lozier v. N. Y. Central R. R., 42 *Barb.* 465). 5th. Again: "The terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have, generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense." "This rule does not restrict the court to the perusal of a single instrument or paper; for while the controversy is between the original parties, or their representatives, all their contemporaneous writings relating to the same subject are admissible in evidence" (*Greenleaf on Evidence*, vol. 1, secs. 278 and 283). The main question in this case is to ascertain the intent of Henry Barclay at the time of making the transfer to Thompson, in respect to the conveyance and alienation of his interest in the old Eastern Post Road. This intent is to be gathered not only from the language of the deed itself from Barclay to Thompson, but also by reference to those deeds, and the circumstances attending them, which brought the title of the land to Barclay, and the deed to which reference is made in the

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conveyance from Barclay to Thompson, which conveyed a portion of the premises to Gates.

II. This intention is further shown in that portion of the description in the deed from Barclay to Thompson, which makes an exception of a certain portion of the land before described, which had been previously deeded by Barclay to George Gates. "An exception is something reserved by grantor out of that which he has before granted. It is indispensable to a good exception that the thing excepted should be part of the thing previously granted, and not of any other thing" (Cook v. Haight, 3 *Wend.* 632; Craig v. Wells, 11 *N. Y.* 321). A grantor may except lands either because he does not own and can not convey them, or because he does not intend to convey them if he is the owner" (People, &c., v. Rector, &c., 22 *N. Y.* 53). It therefore must follow that the line bounding the property deeded to Gates and that bounding the property deeded to Thompson by Barclay, must be a continuous one, and hence it must have been the intention of Barclay to alien his entire interest in the Eastern Post road aforesaid adjacent to said premises.

III. Besides all this, the acts done under these deeds serve to show that the foregoing views are correct. There is no pretense that any claim of any kind, from any source whatever, has ever been made for any part of the eastern half of the old post road in question, in opposition to that of those in possession and holding title under the aforesaid deeds. Houses have been erected upon, and titles passed, by good lawyers, for many years past to this portion of the old post road, without question or doubt, until this sale by the defendant to the plaintiff of the premises in question.

BY THE COURT.—SPEIR, J.—The portion of the premises alleged to be defective in the title was formerly included in the easterly half of the old post road

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adjoining the Turtle Bay Farm, and included in subdivision No. 6 of the farm belonging to Francis B. Winthrop, and known as the Turtle Bay Farm.

In 1820, the co-heirs of Francis B. Winthrop, excepting William H. Winthrop, executed a deed to the latter, and in the recitals it is stated that the parties to the deed caused the farm to be surveyed and divided by Mr. Randall, a surveyor, into six different farms or subdivisions. This deed was made for the purpose of conveying to the grantee in severalty his proportionate share of the entire farm. The subdivisions were numbered one, two, three, four, five, and six, and William H. Winthrop took No. 6, which includes the premises in question. It follows from the declaration in the deed, that the Turtle Bay Farm, without any reservation, had been, by the Randall survey and division, included in the sixth parcel or subdivision. The fact being thus established by the parties themselves furnishes the best evidence of intention.

Moreover, the above conveyance being a friendly partition of the whole farm among the heirs, and the land conveyed, being described not alone by metes and bounds, but also as "subdivision or farm No. 6 of the said Turtle Bay Farm," it may be assumed that the portion of the old post road belonging to the farm, and adjoining No. 6, was included in the conveyance. Besides, it is a familiar rule that the grantee of a lot bounded on a street *prima facie* takes to the centre of the street, and there must be language expressly excluding the street to prevent the grant having this effect. Henry Barclay, by deed dated 1826, became the owner in fee, by boundaries identical in the deed, to William H. Winthrop, and is referred to as being the same premises. This deed, therefore, carries all the interest of the grantors, whatever it may have been, to the centre of the road.

In tracing the title down thus far, there seems to be

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no controversy, and the plaintiff's counsel, although admitting the effect of the above conveyances, at this point, interposes his objection to the title. His claim is that the deed of 1832, from Barelay to Samuel Thompson did not convey any part of the premises which were formerly within the eastern post road, that the land conveyed is described as being upon the side of the road and the boundary is, *limited to the side and along the side*, instead of running to the road and along the road.

The importance of examining the foregoing deduction of title and the character of the several transfers is plainly manifest. The intention of the several parties is to be ascertained not only from the language in the description of the deed itself, but must ever have reference to relative extrinsic facts. These facts may consist of co-temporaneous writings, relating to the same subject; by reference in this case to the deeds and circumstances relating to the premises described in them, which brought the title down to Barclay. As a clue to this intention and the *import* or effect of conveyances, we are permitted to look to the undisturbed use of the right contested, on the one side, and the unqualified acquiescence, on the other, down to the time of the purchase of the premises by the defendant.

When the survey of the Turtle Bay Farm was made, this eastern post road was in public and common use. The intention was to convert the entire Turtle Bay Farm into six holdings in severalty, which should include the entire area of the farm. In this amicable partition No. 6 had for a portion of its boundaries this road, and it was impracticable and unusual to place the monuments "K" and "nineteen" elsewhere than on the side of the road; while it is apparent that the measurement of land extended to the centre. This results from the fact that the division No. 6 starts at the most northerly corner of subdivision No. 5, which

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corner is in the centre of the old post road, and then runs to the monumental stone "K." It is well-known that in the rural districts it is the custom in the survey of lands to mark courses and distances by artificial monuments, and in case the boundary is made by the highway these monuments are placed on the side of the road between the exterior line enclosing the street and the road-bed, while the quantity of land conveyed extends to the centre. Where, therefore, the road is the limit and boundary the expression is both natural and common "to the side and along the side," thereby defining in common parlance that portion of the road lying between the exterior limit and the centre.

Intention is further manifest in the description in the deed from Barclay to Thompson, which contains an exception of a certain portion of the land before described which had previously been deeded by Barclay to Gates. The excepted portion is situated on the post road directly north of the land in question, and on the same continuous line with it. Barclay's deed to Gates uses words which carry the land in the road to its centre. As Barclay therefore conveys a parcel of land in the road to Gates, with the land adjoining thereto, and also in the deed to Thompson conveys a large parcel of land which, in terms, includes land sold to Gates, it seems to follow that Barclay intended to convey to Thompson his right to the land in the road adjacent to the tract in question.

The rules which govern the interpretation of grants of land in the country are strictly applicable to the present case. This was a public highway at the time, and the reasons for the construction of the deeds are based upon principles of great public convenience, and do not permit that one should be the owner of a farm and another of a road or stream running through it.

Although the road has been closed for twenty-five years, it does not appear that either Thompson or his

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representatives have since the date of his deed claimed the right to be in possession of any portion of the land in controversy, and have never made any claim or demand upon any one who has held the same since that time. The question, then, is simply in whom is the fee in the soil vested to which this easement of a public highway was attached?

The fee must rest somewhere, or be in abeyance. If the views above expressed are correct, it follows that these several conveyances commencing with the partition of the co-heirs of Francis B. Winthrop carries the fee of the premises in dispute to the centre of the road down to the defendants.

An abstract of a decision referred to in the present number of the *Albany Law Journal*, p. 145, February 26, 1876, in the case of *White's Bank of Buffalo v. Nichols*, has just come to my notice. The opinion is by Mr. Justice ALLEN, of the court of appeals. That experienced and learned judge has so fully and pointedly stated the doctrines relating to boundary upon a highway, construction of grants, &c., that I can not do better than refer to the case as authority. He says: "Whether a grant of lands bounded by a street, highway, or running stream extends to the centre of such street, highway, or stream, or is limited to the exterior line or margin thereof, depends upon the *intent* of the parties to the grant as manifest by its terms; and while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, no particular word or form of expression is necessary to overcome such presumption. It is not sufficient to exclude from the operation of the grant the soil of a highway *usque ad medium flum* that the grant is made with reference to the plan annexed, the measuring or coloring of which would exclude it; or by lines and measurements, which would bring the premises only to the exterior

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line of the highway ; or that they are bounded generally by the line of the highway, or along the highway : or by any similar expression."

The judgment should be affirmed with costs.

SANFORD, J., concurred.

ELISE MAGNIN, *et al.*, PLAINTIFFS AND RESPONDENTS, v. WILLIAM B. DINSMORE, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, DEFENDANT AND APPELLANT.

COMMON CARRIERS.

THEIR DUTIES AND LIABILITIES.

CONCEALMENT OF THE VALUE OF PACKAGES AS AFFECTING THE CONTRACT WITH CARRIER.

The case at bar has been tried four times in the court below, and has been reviewed three times by the court of appeals (8 *Jones & Spencer*, 182; 53 *N. Y.* 652; 56 *Id.* 168; 6 *Jones & Spencer*, 248; 60 *N. Y.*).

On the last trial, now in review, the judge submitted to the jury the question as to whether the defendant was guilty of gross negligence or misfeasance or abandonment, in the course of its duties as carriers, and charged, that if the jury found it was so guilty, that the plaintiffs were entitled to recover the value, with interest, of the goods shipped.

Held by the court, that the evidence did not warrant this submission as to gross negligence, &c.

See the opinions on the review of this and the former questions before this court and the court of appeals.

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

Opinion of SPEIR, J.

The action was brought by the plaintiffs who compose the firm, Vve J. Magnin, Guedin & Co., against the Adams Express Company, to recover the value of a package entrusted to its care, for transportation to Memphis, Tennessee, and alleged not to have been delivered there to the consignees thereof.

The jury, under the charge of the court, found a verdict for the plaintiffs for the full value of the package, with interest, amounting to two thousand eight hundred and thirteen dollars and ninety-six cents, and judgment was entered thereon.

The defendants appeal from the judgment and the order denying a motion for a new trial. The facts appear in the opinion of the court.

Mr. Da Costa, for appellant.

C Bainbridge Smith, for respondent.

SPEIR, J.—This case has been tried four times. It has been carried to the court of appeals three times, and we are now again called upon to review the questions arising on the fourth trial.

The history of the case, and the several stages of judicial investigations it has passed through, may be found recorded in 3 *Jones & Spencer's R.* 182; 53 *N. Y.* 652; 56 *Id.* 168; 6 *Jones & Spencer*, 248; and 60 *N. Y.*

It is not necessary, nor will it serve any good purpose, to review the foregoing decisions, as they may be easily referred to, and are not now important further, than to briefly state the result of the decision in the case last reported by the court of appeals. The very able and learned opinion by Mr. Justice FOLGER has so fully and precisely stated the points upon which a right decision of the case depends, that our duty will be sufficiently discharged by ascertaining whether this

last trial has been conducted in accordance with that decision.

By the last two decisions of the court of appeals it was decided that the contract between the plaintiffs and defendant did not *per se* excuse the defendant for liability for a loss arising from its negligence. This contract was that if the plaintiffs did not state to the defendant the value of the property entrusted to its care for transportation, they could not demand in case of loss a sum exceeding fifty dollars for the loss or detention thereof. The question whether the package had been delivered to the consignees at Memphis had been before submitted to the jury, and they found for the plaintiffs. The defendant had given no explanation of the non-delivery. But it was shown on the part of the plaintiffs that some months after the shipment, and within a year, the box containing the goods which had been shipped was picked up near Gowanus, on the East River shore, empty. And the court held, these facts thus shown would have warranted the submission to the jury of the question of negligence, if that was a material inquiry in determining the rights of the parties.

The appellate court, in its last decision, points out the distinction between the case then presented for adjudication and the case decided in 56 *N. Y.*, and says: "But the judgment of the court then given was only upon the questions then presented. Other questions now arise." And the court, by its last decision upon the questions then presented, decided that the plaintiffs were not entitled to recover for the actual value of the contents of the package, by reason of their concealment and fraud in not disclosing to the carrier the contents thereof. The question of the concealment of the value of the goods contained in the box had been passed upon on the former trial as one of fact, and the jury found that there was not upon the

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part of the plaintiffs either active fraud or concealment, neither in the manner in which the box was delivered to the carrier nor in what was said or left unsaid at the time of the delivery, nor in the character of the package in the way in which it was enclosed and sealed.

The defendant urged at the former trial, and on the argument of the last appeal, that the question was not one of fact for a jury, but of law for a court, and that the plaintiffs should be nonsuited for concealment of the true value of the package; that when the shipper agrees with the carrier for a limited liability, he thereby expresses to the latter his estimate of the risk to be run, and the care needed, and holds out the package to him as an ordinary article which he would have no objection to take as a matter of course. The carrier is thereby put off his guard. This puts upon the carrier the duty of inquiry. It is a concealment of an important fact entering into the bargain to be made; that such a concealment amounts to a fraud in law upon the carrier, and where there is no dispute as to the material facts, as there is none in this case, it is a question of law for the court, and not of fact for the jury.

The court has sustained this position of the defendant, and recorded the decision as follows: "That the question of concealment of value upon the undisputed facts of the agreement, and of the silence of the plaintiffs, was one of law for the court, and not of fact for the jury, and that silence only as to value amounted to such an imposition upon the defendant as would relieve it from a liability for the total value of the goods, *unless something more* in its conduct is shown than negligence to carry safely and deliver promptly."

It is not claimed by the court that although in such a case the carrier is relieved from liability for a loss occurring from ordinary negligence, that he will thereby be relieved when his acts and those of his servants

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have amounted to misfeasance or abandonment of his character as carrier.

The evidence before the court below did not differ in any material degree from that before the court of review last decided. The learned judge charged the jury that if they found that the goods were not delivered in Memphis, and that the defendant was guilty of gross negligence or misfeasance or abandonment in the course of its duties as carriers in the transportation of the goods, then the plaintiffs were entitled to recover their value, with interest. The defendant's counsel requested the court to charge that if the jury found that the package was not delivered in Memphis, on the undisputed facts of the case, as matter of law, the plaintiffs are not entitled to recover the total value of the goods, but only the limited sum of fifty dollars, with interest. This request was declined, and an exception taken. This, we think, was error, and therefore the judgment and order appealed from should be reversed, and a new trial ordered, costs of the appeal to abide the event.

SANFORD, J.—I concur in the result arrived at by my learned associate, but solely upon the ground that the evidence in the case did not, in my opinion, warrant the submission to the jury of the question whether the defendant had been guilty of gross negligence or of misfeasance or of abandonment in the performance of his duties as a carrier in respect to the transportation of the merchandise, or of a conversion thereof. These several degrees of culpability are correctly defined by the learned judge in his charge to the jury, and I am of opinion that there is no evidence in the case that any or either of the acts or omissions comprised within such definitions respectively were either committed or omitted by the defendant. If the evidence is insufficient to sustain a finding in the

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affirmative of either of the several questions thus submitted to the jury, there was error in the charge of the learned judge, and the verdict of the jury should accordingly be set aside.

It has been twice held by the general term of this court, that evidence substantially the same as that now before the court ought not to go to the jury, upon the question of simple negligence (3 *Jones & Spencer*, 182; 6 *Id.* 248). In the case last cited it is stated that "the judge who presided at the second trial felt himself bound by the decision of the general term as to the insufficiency of the evidence to establish negligence, and consequently, the proof being the same, he withdrew this branch of the case from the consideration of the jury," and that, "the general term sustained the rulings of the trial judge." The court of appeals thereupon held that this ruling was erroneous, and that "there was evidence which would have warranted the submission to the jury of the question of negligence" (6 *J. & S.* 251; 56 *N. Y.* 173). But it does not necessarily follow that the same evidence which would warrant the submission to the jury of the question of simple negligence will also warrant the like submission of the question of gross negligence, much less that of misfeasance or abandonment, or conversion (*Riley v. Horne*, 5 *Bingh.* 217). The ruling of the general term on each of the occasions referred to necessarily involved the proposition that the evidence was insufficient to warrant such submission upon either of these questions, inasmuch as that evidence which is insufficient to sustain a finding of the lower degree of culpability is *a portion* insufficient to sustain a finding of the higher. That ruling still stands as the law of the case, except in so far as it has been questioned by the court of appeals, and that court has only decided that the ruling was erroneous with respect to the minimum of fault, without intimating

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any opinion as to the sufficiency or insufficiency of the evidence, as applicable to the question of any other grade of misconduct whatever. On the last appeal to the court of appeals it was held that in consequence of a concealment by the plaintiff of the true value of the goods the defendants were relieved of liability for a loss occurring from ordinary negligence, but the court expressly declined to hold that his exoneration extended to the case of a misfeasance or abandonment of his character as a carrier. That question, thus left open, was in my opinion correctly decided by the learned judge at the trial, when he charged, in effect, that if the loss occurred through gross negligence or misfeasance or by reason of abandonment, or of a conversion of the property, the defendant must be held liable. But the mere discovery of the box in which the goods were originally packed, at the time, and under the circumstances, and in the manner disclosed by the evidence, seems to me insufficient to inculcate the defendant to the extent implied by the definition of either one of the several offenses or grades of offense imputed to him by the verdict, as laid down by the learned judge in his charge; and this notwithstanding the absence of any explanation of the omission to deliver the goods to their consignee. Under the ruling of the court of appeals, in its last decision, it seems to me that the *onus probandi* with respect to something more than simple negligence, is upon the plaintiff, and that there should therefore be made apparent something more than a mere conjectural probability of the commission of the wrong imputed: "there must be some element of moral certainty and exclusion of reasonable doubt" (*Payne v. Forty-second Street R. Co.*, 8 J. & S. 13).

The judgment should be reversed, and a new trial ordered; costs to abide the event.

Statement of the Case.

PIERSON S. HALSTEAD, *et al.*, RESPONDENTS, v.
JACOB H. V. COCKCROFT, IMPLEADED, &C.,
APPELLANT.

PRACTICE.

PARTIES TO ACTION.

REVIVAL OF ACTION IN FAVOR OR AGAINST EXECUTORS AND REPRESENTATIVES.

In an equity action against several defendants for an accounting, on the death of one of the defendants the action survives, and his executors and representatives should be made parties.

The executors or representatives may be brought in as parties by a motion in the action made by them or any other parties interested in the revival.

"If the power to direct the continuation of the action *does not exist*, no relief can be afforded; but if it *does exist*, the circumstances which will justify its exercise rests in the legal discretion of the court" (*Livermore v. Bainbridge*, 49 N. Y. 125).

In the case at bar a referee had reported that the plaintiffs were entitled to an account from both of the defendants. In the meantime one of the defendants died. After his death, on application of plaintiff, an order was made discontinuing the action as to the deceased. The surviving defendant appeals from that order, claiming that the executrix of the deceased defendant should be made a party to the action. *Held*, that the order should be reversed, on the ground that the executrix was a necessary party to the action, and should be brought in.

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

This is an appeal from an order discontinuing the action as to one of the defendants.

The action is brought to compel the defendants to account for a cargo of merchandise.

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The defendant Cockcroft made and concluded a charter party in his own name, and on his own account and risk, and fitted out a vessel with a cargo to the amount of five thousand one hundred and fourteen dollars and forty-seven cents, and sold to the plaintiffs an interest in the cargo and merchandise shipped to the amount of one thousand two hundred and ninety-seven dollars and five cents. By agreement, the interest of the plaintiffs was limited to the proportion which this latter sum bears to the costs of the whole cargo, they participating in the profits and losses to the amount of their purchase. The defendant Cockcroft was also by agreement to appoint the defendant Lomelino supercargo, which was done, with the consent and knowledge of the plaintiffs, who was to receive one-half of the net profits realized on the adventure.

The cause was referred, before the death of Lomelino, to a referee, on whose report an order was entered that the plaintiffs were entitled to an account from each of the defendants. Lomelino died in 1855. After his death an order was made, on the application of the plaintiffs, discontinuing the action as to Lomelino, from which the defendant Cockcroft appeals, claiming that Mrs. Lomelino, his executrix, should be made a party to the action.

Charles H. Black, for appellant.

Daniel B. Ames, for respondent.

BY THE COURT.—SPEIR, J.—Although the defendant Lomelino, by his answer, claims that he never made any contract with the plaintiffs, and is not accountable to them, and is improperly joined as defendant, it clearly appears that he claims a lien on the property in dispute, and sets up a counter-claim to the plaintiffs' claim. If Lomelino was appointed supercargo by the

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defendant Cockcroft upon terms entitling him to share in the profits and losses, with the knowledge of the plaintiffs, then he should account ; then the referee has properly decided that the plaintiffs are entitled to an account with each of the defendants. There is no evidence in the case showing he was not interested as a partner. This being so, it is difficult to see how a final determination of the action can be had without bringing the representatives of Lomelino before the court. It is still more difficult to see how in the present stage of the action it is possible to proceed against the defendant as surviving defendant alone, and properly adjust the conflicting interests of these several parties.

It is not the case of a joint contract, where, if one of the parties die, his executor or administrator is at law discharged, and the survivor alone can be sued, but it is a proceeding in equity, where Lomelino has an interest in the property, holding by adverse claim, and being in possession. The executors of the deceased party are liable, and his personal representatives, as well as survivors, must be made parties to a suit in equity (*Story's Equity Pleadings*, § 169). The plaintiffs have made both Cockcroft and Lomelino parties defendant, and call upon them for an account, and an interlocutory order has been made that the plaintiffs are entitled to an account against both.

The important question before me is, how can this relief be obtained ? Whether it can be obtained on motion is not free from difficulty. The learned judge in the opinion delivered by him in *Livermore v. Bainbridge* (49 N. Y. 125), has come to the conclusion, after an able and elaborate examination, that the Code does not in terms authorize such a motion on the part of the defendant. He proceeds to show that the former practice in the court of chancery permitted it to be done on motion when the defendant had

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acquired some rights in the litigation, and that, under section 469 of the Code, former rules and practices not inconsistent with these provisions of the Code were still in force, and that it was allowable under those former rules. It was the well-established practice in the court of chancery, independent of any statutory provisions, if there had been any decretal order in the suit from which the defendant could derive any advantage where he had obtained an interest in the prosecution of the suit, where a counter-claim had been interposed, and an issue joined on it for trial, it could be revived at the instance of a defendant or his representatives, in case the plaintiff or his representatives neglected to revive it (*Story's Equity Pleadings*, §§ 372, 373; *Souillard v. Dias*, 9 *Paige*, 395). The Lord Chancellor, in *Harwood v. Schmedes* (12 *Vesey*, 316), says: "One of the cases in which a defendant may revive is confined to matter of account, and where the defendant has an interest in the further prosecution of the suit."

It is plain, if the court has not the power to direct an action to be continued on the application of the defendant or his representatives, where a counter-claim has been interposed, it might be productive of great injustice; an action founded on the subject-matter of the counter-claim might be barred by the statute of limitations. Under section 121 of 2 *R. S.* marginal page 185, the action has not abated, but is still in court; no revivor is necessary, and it is a mere question of bringing in parties. Now, sections 121 and 122 *R. S.* allow parties to be brought in on motion, when formerly a supplemental bill or a bill of revivor would have been necessary. The learned judge in *Livermore v. Bainbridge* (*supra*) forcibly observes: "If the power to direct the continuation of the action does not exist, no relief can be afforded in such a case. If the power does exist, the circumstances which will justify its exercise rest in the legal discretion of the court."

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The defendant Lomelino has interposed his counter claim, an issue has been joined upon it, and an interlocutory order has been made that both defendants account with the plaintiff. I think the defendant Lomelino's representatives, as well as the surviving defendant, have acquired such an interest in persecuting the action as entitles both to have it prosecuted.

It follows by analogy to the provisions of the above sections 121 and 122 that the relief required in this case, though not specially provided for, may be obtained in the same manner. I think the order appealed from must be reversed, with costs.

SANFORD, J., concurred.

CONRAD BOLLER, PLAINTIFF AND APPELLANT, v.
THE MAYOR, ALDERMEN AND COMMON-
ALTY OF THE CITY OF NEW YORK,
DEFENDANTS AND RESPONDENTS.

BOARD OF SUPERVISORS, THEIR POWER AND AUTHORITY.
ULTRA VIRES. ESTOPPEL CREATED BY A FORMER ADJUDICATION, ITS CHARACTER, EFFECT, AND CONDITIONS.

The Board of Supervisors had no power to execute a lease for an armory, for any portion of the National Guard of the state of New York organized and existing within the limits of the city and county of New York, without a prior demand for the same, in conformity with section 120 of the act of the legislature of the state of New York, entitled "The Military Code;" and a lease, executed by said Board without any prior demand having been made in conformity with said section 120, is wholly null and void. The doctrine of "*ultra vires*" applies to such action of the Board of Supervisors.

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A demand from the proper military authorities, duly made and countersigned, and a certificate from the Adjutant-General of the state (pursuant to said act) were conditions precedent to any action whatever on the part of the Board of Supervisors towards leasing premises for an armory. The indispensable conditions upon which rested any power or authority of the Board of Supervisors to enter into such a lease were wanting, and in their absence no valid lease could be made. The rent for such premises could not and never did become a county charge, and any covenant on the part of said board to pay rent was null and void on the principle of "*ultra vires*."

Neither the county nor the corporation of the city of New York was bound by this lease, nor could the appropriation of the premises to the use of the Eighth Regiment of The National Guard by a resolution of the Board of Supervisors, and the subsequent occupation and use by said regiment pursuant to the resolution, be deemed a ratification of the lease such as would render it obligatory upon said county or corporation (*Fallon v. The Mayor, &c.*, 4 *Hun*, 588; *Ford v. The Mayor*, *Ibid.* 587).

In the case at bar, it appears that the plaintiff, in August, 1874, made complaint before the civil justice of the eighth district of the city of New York against the Board of Supervisors and the defendants in summary proceedings under the statute relating to landlord and tenant to recover the possession of said premises. That a summons was issued against said Board and these defendants, and duly served, but no appearance was ever made in said proceedings by these defendants or said Board. That judgment was finally rendered in said proceeding in favor of said plaintiff, and against said board, and these defendants, in substance and effect, that the plaintiff should have possession of said premises because of the non-payment of the rent.

Were the defendants estopped by this judgment from denying their indebtedness to the plaintiff for the use, occupation, and rent of said premises, claimed by him, and adjudicated upon in said proceedings, and also claimed by him in this action, and can the defendants in this action claim and assert the invalidity of this lease, after such judgment? In brief, Does that judgment operate as an estoppel?

Held, that the defendants were not estopped by that judgment, from pleading and establishing and resting their defense upon the invalidity of the lease.

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The doctrine, rules, and principles of, and the cases affecting, *estoppel, created by a former adjudication* reviewed and considered by the court. *Bolton v. Jacks* (6 *Robt.* 166) reviewed and approved. *Roderigas v. East River Savings Institution* (court of appeals, unreported at date) does not call in question the principles upon which *Bolton v. Jacks* was decided.

In summary proceedings to recover possession of premises under the statute (2 *R. S.* 515, § 41), no adjournment can be made except upon the request of a party to the proceedings, and for the purpose of enabling such party to procure his witnesses. The statute, in authorizing adjournments for a specified purpose, and upon a specified request, impliedly prohibits all adjournments except such as are so expressly authorized.

The officer or magistrate before whom the proceeding is pending exceeds his jurisdiction by an unauthorized and illegal adjournment, and he is precluded from the further hearing or the exercise of jurisdiction in the case, and all his future acts and proceedings in the case are void. (Many cases cited in the opinion of the court on this point.)

Before SPEIR and SANFORD, JJ.

Decided March 20, 1876.

This action was brought to recover of the defendants the sum of eighty-one thousand dollars and interest, alleged to be due the plaintiff as the rent of the third and fourth floors of certain buildings in the city of New York, leased by him to the Board of Supervisors of the county of New York, to be used and occupied as armories and drill-rooms, for a term of ten years, from May 1, 1871, at a rental of thirty-six thousand dollars per annum.

The complaint avers that the tenants, the Board of Supervisors, &c., entered into possession on April 1, 1872, and thereupon appropriated and have ever since occupied the premises as an armory for the Eighth Regiment of the National Guard of the state of New York, and that the rent from that day to July 1, 1874, is due and unpaid.

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The consolidation of the county of New York with the defendants, by act of the legislature, and the consequent liability of defendants to pay such rent, are averred in the complaint.

The answer denies the authority of the Board of Supervisors to execute the alleged lease, except under the provisions of the act of May 17, 1870, entitled "The Military Code," and avers that it was executed in violation of the provisions of that act, and without any prior demand having been made in conformity with section 120 thereof; and that, by reason of the absence of such prior demand, the alleged lease was and is wholly null and void.

Upon the trial, William J. Kane was called as a witness for plaintiff, who testified that since January 1, 1870, he had held the official position of justice of the eighth district court, in the city of New York; that proceedings were had before him, as such justice, in September, 1874, in regard to the premises described in the complaint; that on August 28, 1874, he issued a summons returnable on September 1, following; that on that day, some one appeared and filed a counter-affidavit; and that the matter was adjourned from time to time, thereafter, until February 16, 1875, when proofs were taken by him, and judgment rendered in favor of the landlord.

The record or roll of the judgment thus rendered was then produced and read in evidence, on the part of the plaintiff; from which it appeared that on August 19, 1874, the plaintiff made oath in writing, before a notary public, to the effect that on June 1, 1870, by a written lease bearing date on that day, he let and rented the premises above-mentioned unto the Board of Supervisors of the county of New York, for the term of ten years, from May 1, 1871, at the annual rent above stated; that on April 1, 1872, the said Board of Supervisors entered into possession, and have ever

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since occupied said premises ; that the said Board of Supervisors and the mayor, &c., of the city and county of New York, with whom the county of New York had become consolidated, were indebted to him in the sum of eighty-one thousand dollars for the rent of said premises pursuant to said lease ; that the relation of landlord and tenant existed between himself and the said Board of Supervisors, and the said mayor, &c., in respect to said premises ; and that the said premises were in the occupation of the said Board of Supervisors and of the said mayor, &c., as tenants, and of the Eighth Regiment of the National Guard of the state of New York as their under-tenant ; that the said regiment continued to occupy the premises, and that the said county, and the said mayor, &c., held over and continued in possession, after default in the payment of such rent, without his permission. It further appeared from such record that this affidavit was presented to the said justice, and that an application was made to him thereon on August 28, 1874, for process and proceedings to remove the Board of Supervisors, the mayor, aldermen, and commonalty of the city of New York, George D. Scott, and the said Eighth Regiment of the National Guard from the said premises, on the ground set forth in said affidavit. That a summons in due form was thereupon issued, directed to the said Board of Supervisors, to these defendants, to Colonel George D. Scott, commanding the Eighth Regiment of the National Guard of the state of New York, and to the said Regiment as tenants, returnable on September 1, 1874, requiring them and each of them to remove from the premises, or to show cause on that day why possession thereof should not be delivered to the landlord. That the summons was duly served on the Board of Supervisors, these defendants, George D. Scott, and the said Regiment ; that on September 1, 1874, the landlord appeared and demanded the rent

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and possession ; that "the tenant" appeared and filed counter-affidavits, viz., the affidavit of George D. Scott, colonel commanding the Eighth Regiment of the National Guard, denying any knowledge or information sufficient to form a belief as to the indebtedness of the Board of Supervisors or of the Mayor, &c., to the plaintiff for rent, and denying that the said Eighth Regiment were under-tenants of the premises. The record shows no appearance by or on behalf of the Board of Supervisors, or by or on behalf of the defendants herein. It further appeared by such record that the matter was thereupon adjourned as follows : from September 1 to September 22 ; thence to October 13 ; thence to October 27 ; thence to November 10 ; thence to December 8 ; thence to December 15 ; thence to January 5, 1875 ; thence to January 19 ; thence to February 2 ; thence to February 16 ; on which day, after hearing the allegations and proof of the landlord, judgment was rendered in his favor, that he have possession of the premises by reason of the non-payment of said rent.

Upon this proof, together with evidence showing a proper demand for the rent upon the comptroller of the city of New York, the plaintiff rested his case.

It was thereupon admitted, for the purposes of the trial, that the lease in question was executed without any demand having been made upon the Board of Supervisors, such as is required by section 120 of the Military Code of 1870 ; but objection was duly taken to the materiality of this fact, and to its admissibility in evidence, on the ground of an *estoppel* claimed to have been created by the adjudication in the district court : and exception was duly taken by the plaintiff to the ruling of the court, thereupon, made directing a verdict for defendant. The said exception was ordered to be heard at the general term in the first instance.

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judgment in the meantime being suspended, and the case is now before the court for decision accordingly.

Mr. Wingate, for plaintiff, in support of his exception.

Mr. Carter, for defendant, in opposition.

SANFORD, J.—The Board of Supervisors of the county of New York acted without authority of law in hiring the premises mentioned in the complaint, and in accepting from the plaintiff the lease upon which this action is brought. By section 120 of the Military Code (*Laws of 1870*, ch. 80), they were authorized, in certain cases, and upon certain contingencies, to erect or rent armories and drill rooms; but this could only be done under the particular circumstances prescribed by the act, and in accordance with its provisions. A demand from the proper military authorities, duly made and countersigned, together with a certificate from the Adjutant-General of the state, was a condition precedent to any action whatever on their part in this direction. No such demand for an armory to be used by the Eighth Regiment of the National Guard of the state of New York, or by any of the companies composing such regiment, was ever made by any one. In short, the indispensable conditions, upon which depended the power and authority of the Supervisors to enter into the lease, were never complied with, and, in the absence of any compliance with these indispensable conditions, no valid lease could be made. The rent reserved by the plaintiff's lease never became a county charge, and any covenant on the part of the Supervisors to pay such rent was null and void, on the principle of *ultra vires*. It is suggested, on behalf of the plaintiff, that the provision of the statute with respect to a demand and certificate

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is applicable only to the case of armories provided for the use of separate companies, and that, by the terms of the act, the procurement of regimental armories, to be used by several companies, is made discretionary with the Supervisors and the Inspector General; but such discretion is accorded and can be exercised only as an alternative to the erection or hiring of a company, troop, or battery armory, in compliance with a demand therefor, duly made by a captain, or commandant of a troop, battery, or company, countersigned by the commandant of a regiment, battalion, brigade, or division. The conditions of the statute must be complied with, and it must be made to appear, in the manner thereby prescribed, that the exigency has arisen with respect to *at least one company, troop, or battery*, before the Supervisors and the Inspector General are at liberty to consider the expediency of procuring suitable accommodations for several. When it has been made to appear, in the manner pointed out by the act, that the conditions exist, upon which an armory for the use of a single troop, battery, or company may be erected or rented, then, and not till then, may the supervisors either erect or rent such armory, or provide a regimental or battalion armory, to be used by several troops, batteries, or companies, as the Inspector General and the Board of Supervisors of the county shall deem expedient. This language readily admits of a construction which would make the approval of the Inspector General essential to the adoption of either alternative; but it would be absurd to suppose that the legislature intended to prohibit the Supervisors from procuring the armory accommodations required by a single company, troop, or battery, unless and until the necessity therefor should be made to appear by a demand from the proper company and regimental authorities, corroborated by a certificate from the Adjutant General of the state, and, by the very

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same enactment, authorize and empower them, in their discretion, with the assent of the Inspector General, but without any demand therefor whatever, and without any certificate from any one, to incur the expense of procuring the much more expensive, and perhaps less needed, accommodations of like character that would suffice for several companies, or even a whole regiment or battalion. Neither the county nor the corporation of the city was bound by the lease, nor can the appropriation of the premises to the use of the Eighth Regiment, by a resolution of the Board of Supervisors, for the use and occupation thereof by the Eighth Regiment, pursuant to such resolution, be deemed a ratification of the lease such as will render it obligatory upon the defendants (*Fallon v. The Mayor*, 4 *Hun*, 583 ; *Ford v. The Mayor*, *Ibid.* 587).*

The defendants were therefore entitled to a verdict upon the admitted facts of the case, unless, by the judgment of the justice of the district court, they were estopped from denying their indebtedness to the plaintiff for the rent claimed by him in such proceedings, and in this action, to be in arrear, and from asserting the invalidity of the said lease.

Does the judgment in such summary proceedings operate as such estoppel ?

There are many cases in which estoppels are sanctioned and sustained on equitable grounds. But the estoppel created by a former adjudication is not generally of this character, though it may be, when its interposition is necessary for the protection of the officers of the tribunal before which it was rendered, or for that of innocent third persons who have taken action to their detriment on the faith of it. In general it is merely a "technical estoppel," without other sanction or support than that of public policy. The

* Affirmed in court of appeals, December 21, 1875.

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maxim "*interest reipublicæ, ut sit finis litium*" discloses its origin and the ground on which it rests. It discourages litigation, to the advantage of the community, but like all other technical estoppels, it sometimes shuts out the truth, to the detriment of the individual. It is for this reason that technical estoppels are deemed "odious," and are not favored in law.

In the present case no particular equity in favor of the plaintiff excludes the defense upon which the defendants rely, and it remains to be seen whether this summary judgment will have the effect of a technical estoppel.

To operate as an estoppel, a former adjudication must have been rendered by a tribunal having a complete jurisdiction over both the parties and the subject-matter involved. Unless these conditions exist the judgment is not conclusive, either in evidence or as a plea. With respect to courts having general jurisdiction, the intendment of law is always in favor of the validity of their judgments. In regard to tribunals of limited and special jurisdiction there is no such intendment. Every fact necessary to uphold the jurisdiction of inferior courts must either appear by the record or be affirmatively shown by evidence *aliunde*. But whatever be the extent of the powers of the court, whether general or limited, if it proceed without jurisdiction, its judgment will be a nullity; and the record thereof is never conclusive as to the *recital* or *statement* of a jurisdictional fact, unless it be to the extent of protecting its officers or other innocent persons who have taken action to their detriment on the faith of it.

These general observations express the settled and established doctrine on this subject. Any apparent conflict with, or exceptional departure from it, is traceable to the difficulties encountered in its application to particular cases. The authorities on the subject were compiled and examined by this court with great ful-

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ness and particularity in *Bolton v. Jacks* (6 *Robt.* 166); and although the soundness of the judgment rendered in that case, which was to the effect that in admitting to probate the will of a testator not at the time of his death an inhabitant of New York, the surrogate of this county exceeded his jurisdiction, and that his proceedings were void, and could be attacked collaterally, has been recently questioned in the prevailing opinion of the court of appeals, in the unreported case of *Roderigas, administratrix, &c. v. East River Savings Institution*, to which more particular reference will be made hereafter. I am not aware that the general doctrine there laid down by this court has been repudiated or impugned. The doctrine was stated in that case in the following terms: "Want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not; and the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the facts recited; and the party against whom a judgment is offered is not, by the bare fact of such recitals, estopped from showing by affirmative facts that they were untrue." Judge ALLEN's opinion, in *Dobson v. Pierce* (12 *N. Y.*, 164), and Judge MULLIN's, in *Potter v. Merchants' Bank* (28 *N. Y.* 654), were cited, among many others, as directly in point.

Applying this general doctrine to the record of the judgment now relied upon as a conclusive estoppel, we find, in the first place, that it was rendered by an officer of local and limited jurisdiction, in special statutory proceedings of a summary character; secondly, that, by virtue of the statute, the jurisdiction of such officer depends upon the existence as between the parties, of the particular relation of landlord and

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tenant, under an agreement whereby the premises in question are held (2 *R. S.* 513, § 281; *Benjamin v. Benjamin*, 1 *Seld.* 383, 387). I am of opinion that the existence of the relation of landlord and tenant between the parties under an agreement is a jurisdictional fact, the absence or non-existence of which renders a judgment in summary proceedings on the recovery of demised premises null and void; and that it was therefore competent for the defendants to show, as they have shown by the admission of the plaintiff, that no such relation existed, inasmuch as the lease recited in the record as establishing that relation was executed by the supervisors without legal authority. The recitals as to such a lease contained in the record made the judgment *prima facie* evidence of its existence and validity, but that evidence was effectually rebutted, as it well might be, by the plaintiff's admission, and the judgment was thus shown to be null and void for want of jurisdiction of the subject matter. Had the lease been valid the relation of landlord and tenant would have existed, the jurisdiction of the justice would have attached, and the judgment, in so far as it held that the tenant remained in possession after default in the payment of rent, pursuant thereto, without the permission of the landlord, would have been conclusive in this suit of the defendants' liability to pay such rent, unless the jurisdiction of the justice was assailable on other grounds.

I should have no hesitation in directing judgment for defendants upon the verdict in this case, upon this ground alone, were it not for the recent decision of the court of appeals, in the case of *Roderigas v. East River Savings Institution*, above referred to. But for that decision, the case of *Bolton v. Jacks* would not only warrant such a direction, but, as a controlling authority, would imperatively require it. In *Birckhead v. Brown* (5 *Sandf.* 134) it was remarked that

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“under a system of jurisprudence which clothes those by whom the law is to be declared with so large a discretion as our own, it is only by their scrupulous adherence to the decisions of their predecessors that even a resemblance of stability and certainty in the administration of justice can be attained or preserved, and hence it is only where the error in prior decisions is manifest and grave, the violation of principle plain and undeniable, that the obligation of judges ‘*stare decisis*’ ceases.” In examining the prevailing opinion adopted by the court of appeals in the case referred to, the conclusions of which were sustained by a bare majority of one, three of the learned judges of the court, including the chief justice, dissenting therefrom, I find nothing that calls in question the principles upon which the case of Bolton v. Jacks was decided. It is true that the soundness of the decision in that case was questioned, in so far as it proceeded upon the assumption that the habitation of a testator, at the time of his death, was a jurisdictional fact, which, if erroneously decided by the surrogate in admitting a will to probate, might be collaterally attacked. But the learned judge who questions the correctness of that decision admits that the case before him, which is closely analogous, is not free from doubt, and that its decision either way would be confronted with some authority, and meet with some logical difficulties; and he is careful to declare that his own conclusions are “based upon the construction of the statutes of this state regulating the jurisdiction and proceedings of surrogate’s courts.” Moreover, he asserts the same general principles which were laid down and relied on in Bolton v. Jacks, and which I have but reiterated above. Thus he remarks that “no court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in the particular case, can make a valid record or confer any rights. When a statute

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prescribes that some fact must exist before jurisdiction can attach in any court, *such fact must exist* before there can be jurisdiction, and the court can not acquire jurisdiction by erroneously deciding that the fact exists and that it has jurisdiction." "But where general jurisdiction is given to any court over any subject, and that jurisdiction depends in the particular case upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked, or vacated, *so far as to protect its officers and all other innocent persons who act upon the faith of it.*" I find nothing in this language inconsistent with the general doctrine of *Bolton v. Jacks*, or which must needs be construed as prohibiting its application to the case now under consideration. Nor does it seem to me that the conclusion at which I have arrived in this case is in conflict with that which was reached by the court of appeals in *Roderigas v. East River Savings Institution*. I may add that in the recent case of *Evans, Ex'r, v. Post* (5 *Hun*, 338), the supreme court in the fourth department, held that in an action for the recovery of the rent of premises from which the defendant had been removed by summary proceedings to recover possession, instituted by the plaintiff pursuant to a notice terminating the tenancy, the record of such proceedings was held to be "evidence only of the fact that the right of the defendant to continue in possession had ceased, and that the plaintiff was entitled to possession, and was *not legal evidence of the lease.*" I therefore hold that the record is not a conclusive estoppel; that the plaintiffs' exceptions should be overruled, and that the defendants should have judgment on the verdict.

But the record in question discloses on its face

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another ground, on which, in my opinion, the validity of the judgment may be successfully assailed. The statute provides (2 *R. S.* 515, § 41) that the hearing in summary proceedings for the recovery of demised premises may be adjourned, upon the request of either party, for the purpose of enabling such party to procure his witnesses, whenever it shall appear to be necessary. It does not appear by the record that such an adjournment ever was, or appeared to be, necessary for the purpose specified, or for any purpose, nor does it appear that either party ever requested any adjournment. There is no recital to that effect, and yet it does appear that on the return day of the summons the hearing was adjourned, and that, subsequently, several successive adjournments were had. In purely statutory proceedings before tribunals of special and limited jurisdiction the provisions of the statute must be strictly complied with, and strict compliance therewith must be affirmatively shown, either by the record or otherwise. No intendment in favor either of the acquirement or retention of jurisdiction is warranted. By expressly authorizing adjournments for a specified purpose, and on a specified condition, the statute impliedly prohibits all adjournments except such as are expressly authorized.

By an unauthorized adjournment the magistrate or officer before whom the proceeding is pending exceeds his jurisdiction, and his future proceedings are void. It has been repeatedly held that unauthorized adjournments preclude the further exercise of jurisdiction in ordinary suits at law in justices' courts, and that such suits are thereby discontinued (*Proudfit v. Humman*, 8 *J. R.* 391; *Hogan v. Baker*, 2 *E. D. Smith*, 22; *Wight v. McClave*, 3 *Id.* 316).

Here the adjournments in question were not only unauthorized but expressly prohibited. The statute

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expressly declares (section 41) that an adjournment shall in no case exceed ten days. The record shows that the very first adjournment was in palpable violation of this provision, inasmuch as it was for a period of three weeks. The second adjournment was for the same period. The third, fourth, fifth, and sixth were each for two weeks; the seventh for one week, the eighth for three weeks; the ninth, tenth, and eleventh were each for two weeks. No authority for such an excess of jurisdictional power has been cited, and I have been able to find none. There seems to be no alternative to holding the judgment in excess of jurisdiction, and therefore null and void upon this ground; certainly as against these defendants, who never appeared, and who could therefore neither have requested or assented to such adjournments. Indeed, it is not easy to perceive how their request or assent, if made or given, could have operated to warrant what the statute expressly forbids.

I am therefore of opinion that the judgment in question is void on its face.

As the views I have adopted dispose of the case, I deem it unnecessary to consider the other objections to the validity of the judgment which were urged on the argument by the learned counsel for the defendants.

The plaintiff's exceptions are accordingly overruled, and judgment is ordered for the defendants upon the verdict.

SPEIR, J., concurred.

Statement of the Case.

THE AMERICAN DOCK AND IMPROVEMENT
COMPANY, PLAINTIFF AND RESPONDENT, v.
ROBERT H. STALEY, DEFENDANT AND AP-
PELLANT.

ELECTION BETWEEN CAUSES OF ACTION—

Motion for should be made before the cause is called on for trial.

COUNTER-CLAIM—

When answer will not be regarded as pleading it.

When it asks that the sum therein mentioned may be *set-off*
against any sum that may be allowed to the plaintiff.

SET-OFF—

Defense of needs no reply.

Before CURTIS and SEDGWICK, JJ.

Heard June, 1875 ; Decided August 3, 1875.

George L. Ingraham, for appellant.

R. N. De Forest, for respondent.

The action was to recover wharfage for sundry canal boats and vessels.

The complaint contained two causes of action—one alleging an agreement by defendant to pay for wharfage certain specified prices, the other alleging an agreement by defendant to pay for wharfage so much as the same should be reasonably worth.

The answer, after putting in issue some of the allegations contained in the first cause of action, proceeded thus :

“*Second.* And this defendant further answering the said complaint alleges (it then set out an agreement between the plaintiff and defendant, and a breach of

Statement of the Case.

such agreement) and then concluded thus : “ And that in consequence of the said refusal of the said plaintiffs to perform the said agreement, this defendant suffered damage, amounting to the sum of three hundred dollars, and which sum this defendant asks may be set off against any sum that may be allowed the plaintiff in this action. And, excepting as hereinbefore admitted, this defendant denies each and every allegation contained in the said complaint constituting the first cause of action.

“ *Third.* And this defendant, in answer to the second cause of action in the said complaint, denies each and every allegation therein contained.

“ Wherefore, defendant demands judgment that the complaint of the plaintiffs herein be dismissed, with costs.”

On the trial defendant moved that plaintiff be compelled to elect between the two causes of action.

The motion was denied, and defendant accepted. Plaintiff had a verdict.

On appeal it was urged that defendant was entitled to judgment, on the ground that the answer set up a counter-claim to which there was no reply.

CURTIS, J., wrote for affirmance, holding the proposition stated in the head-note.

SEDGWICK, J., concurred.

Statement of the Case.

WILLIAM WADE, PLAINTIFF AND RESPONDENT, v.
ANTHONY DE LEYER, DEFENDANT AND AP-
PELLANT.

I. OPENING JUDGMENT—

1. LACHES.

Where fourteen years had elapsed since the entry of judgment, and defendant had been examined on supplementary proceedings more than four prior to the motion, and no satisfactory excuse or reason for the delay was shown, held that the motion to open the judgment was properly denied on the ground of laches.

(a) *Suit pending for an accounting.*

That a suit is pending by the defendant in the judgment against the plaintiff therein for an accounting, and the judgment sought to be opened is claimed to be simply the reduction into that form of collateral securities, constitutes no ground for opening the judgment, but on the contrary shows that there is no ground on which to sustain the motion; as the court in which the accounting suit is pending, can give all the protection which the equities of the case call for.

II. EXECUTION—

1. *When leave of court to issue not required.*

When an execution has been issued within five years after entry of the judgment, and returned unsatisfied in whole or in part, a *second execution* can be issued without leave of the court.

Before CURTIS and SEDGWICK, JJ.

Heard June, 1875; Decided August 3, 1875.

D. McMahon and F. Byrne, for appellant.

Charles Blandy, for respondent.

Statement of the Case.

CURTIS, J., wrote for affirmance, holding above propositions.

SEDGWICK, J., concurred.

JOHN LEHMAIER, *et al.*, PLAINTIFFS AND APPELLANTS, v. ALMON W. GRISWOLD, DEFENDANT AND RESPONDENT.

I. INQUEST TAKEN FOR WANT OF AN AFFIDAVIT OF MERITS, WHERE ONE IS REQUIRED—

1. DISCRETION.—The setting aside of such an inquest on terms is in the discretion of the Court at Special Term.

II. ORDER RESTING IN DISCRETION—

1. Can be reviewed only when it appears that there was an abuse of discretion.

Before CURTIS and SEDGWICK, JJ.

Heard June, 1875; Decided August 3, 1875.

Lewis Sanders, for appellant.

Charles Lee Clarke, for respondent.

Statement of the Case.

LOUIS HAAS, ASSIGNEE, ETC., PLAINTIFF AND RESPONDENT, v. THOMAS O'BRIEN, DEFENDANT AND APPELLANT.

Appeal from judgment entered on the report of a referee.

Before CURTIS and SEDGWICK, JJ.

Decided August 8, 1875.

Francis C. Devlin, for appellant.

Jacob & Koch, for respondent.

No opinion.

Judgment affirmed.

CHARLES W. HANCK, PLAINTIFF AND RESPONDENT, v. VERNON K. STEPHENSON, JR., DEFENDANT AND APPELLANT.

VERDICT ON CONFLICTING EVIDENCE.

One of the reasons for the rule, that the court will not disturb.

Though the court may draw a different conclusion from the evidence submitted upon the printed papers than what the jury did, yet it must be considered that the latter had the advantage of seeing the manner and appearance of the witnesses as well as of hearing their statements, and that is a circumstance to which the law attaches importance.

Statement of the Case.

Before CURTIS and SEDGWICK, JJ.

Heard June, 1875; Decided August 3, 1875.

James A. Hudson, for appellant.

William C. Traphagen, for respondent.

Appeal from a judgment entered on a verdict, and from an order denying a motion to set aside the verdict, and for a new trial, made on the minutes.

The only question involved was whether the verdict should be set aside on the evidence.

CURTIS, J., wrote for affirmance, laying down above proposition.

SEDGWICK, J., concurred.

HENRY G. HARRISON, PLAINTIFF AND APPELLANT, v. EDWARD S. TINKER, DEFENDANT AND RESPONDENT.

VALUE OF SERVICES.

ARCHITECT.—Action by to recover the value of services. Plaintiff claimed that there was an usual and customary rate of compensation for the services of an architect, and introduced evidence to show that such rate was five per cent. on the cost of the building.

Evidence in rebuttal.—Held, that defendant, for the purpose of showing that the rates were not uniform, might prove the highest price *he had ever paid* for the same kind of work performed by the plaintiff, the highest as well as the lowest cost of any house built by him, and what the services of an architect paid for by him included.

Statement of the Case.

Before FREEDMAN and SPEIR, JJ.

Heard August 6, 1875; Decided December 6, 1875.

FREEDMAN, J., wrote for affirmance, laying down above proposition.

SPEIR, J., concurred.

ROBERT SEAMAN, PLAINTIFF AND RESPONDENT, v.
ANTHONY McREYNOLDS, IMPEADED, ETC.,
DEFENDANT AND APPELLANT.

I. CAUSE RESERVED GENERALLY ON TRIAL CALENDAR.

1. WHAT NECESSARY TO PLACE IT ON A DAY CALENDAR.

(a) Two days' notice to place it on a day calendar for trial must be given to all defendants who answer separately by different attorneys.

1. *Default* taken against one of such defendants without notice to his attorney is *irregular*, and *must be set aside*.

II. APPEAL.

AN ORDER denying a motion to set aside a default so taken will be *reversed on appeal*. The court below should have exercised its discretion in opening the default.

NOTICE OF APPEAL—AMENDMENT OF.

A notice signed "of counsel" is irregular; but the *General Term* may correct it by substituting "attorney" for "counsel."

Before MONELL, Ch. J., and SEDGWICK, J.

Heard November, 1875; Decided December 6, 1875.

Statement of the Case.

Daniel T. Robertson, for appellant.

H. M. Whitehead, for respondent.

PER CURIAM, holding above propositions, and reversing order below.

GEORGE ETTLINGER, PLAINTIFF AND RESPONDENT,
v. HENRIETTA SILBERSTEIN, DEFENDANT AND
APPELLANT.

APPEAL DOES NOT LIE,

From a judgment entered upon a referee's report made in conformity with a stipulation entered into by the parties and their attorneys, after evidence adduced on both sides, and rulings made to which exceptions had been taken.

Violation of stipulation.—Remedy for must be sought at Special Term.

Before MONELL, Ch. J., and SEDGWICK, J.

Heard November, 1875; Decided December 6, 1875.

Philip Levy, for appellant.

D. S. Riddle, for respondent.

PER CURIAM, holding above propositions.

Statement of the Case.

MAGDALENA MAYORGA, PLAINTIFF AND APPELLANT, v. JOSIE DE LA ROSA MAYORGA, DEFENDANT AND RESPONDENT.

Before **MONELL, Ch. J.**, and **SEDGWICK, J.**

Heard November, 1875; Decided December 6, 1875.

Appeal from judgment on verdict, and from order denying motion to set aside verdict as against the weight of evidence.

Ethan Allen, for plaintiff and appellant.

E. T. Rice, for defendant and respondent.

PER CURIAM.—On examining the testimony it appears that the evidence of the defendant supports the verdict and his credibility was fairly and properly submitted to the decision of the jury.

Judgment and order appealed from are affirmed, with costs.

Statement of the Case.

JEREMIAH J. COLEMAN AND OTHERS, PLAINTIFFS
AND RESPONDENTS, v. SAMUEL CRUMP, DEFENDANT AND APPELLANT.

Appeal from judgment.

Before MONELL, Ch. J., and SEDGWICK, J.

Heard November, 1875; Decided December 6, 1875.

William Henry Arnoux, for appellant.

Andrew Boardman, for respondent.

PER CURIAM.—Judgment affirmed, with costs.

No opinion was delivered.

HARVEY S. NETTLETON, PLAINTIFF AND RESPONDENT, v. EDWARD MATHEWS, DEFENDANT AND APPELLANT.

ASSIGNMENT OF CLAIM SUED ON.

Date of, when immaterial.

When the evidence clearly shows that it was made after the rendition of the services, the claim for which was assigned

Before FREEDMAN and SPEIR, JJ.

Heard October, 1875; Decided December 6, 1875.

Statement of the Case.

C. Delafield Smith, for appellant.

S. E. Church, for respondent.

FREEDMAN, J., wrote for affirmance, laying down above proposition.

SPEIR, J., concurred.

FAYETTE W. PIERCE, *et al.*, PLAINTIFFS AND
APPELLANTS, v. PAUL S. BROWN, *et al.*, DEFEN-
DANTS AND RESPONDENTS.

Before CURTIS and SEDGWICK, JJ.

Heard January, 1876; Decided February 7, 1876.

M. Compton, for appellant.

Le Roy S. Gove, for respondent M. S. Brown.

Mortimore Sanford, for respondent P. S. Brown.

The complaint was dismissed in the court below, and judgment was recovered by defendants.

CURTIS, J., wrote for affirmance, holding that the evidence failed to sustain the cause of action alleged in the complaint.

SEDGWICK, J., concurred.

Statement of the Case.

JONAS FISCHER, PLAINTIFF AND RESPONDENT, v.
THE HOPE MUTUAL LIFE INS. CO. OF NEW
YORK, DEFENDANT AND APPELLANT.

LEAVE TO APPEAL TO THE COURT OF APPEALS

Will be granted where there are numerous other claims against
the defendant involving the same questions.

Before CURTIS and SEDGWICK, JJ.

Heard January, 1876; Decided February 7, 1876.

Samuel A. Noyes, for the motion.

D. S. Riddle, opposed.

CURTIS, J., wrote in favor of the motion, laying down
the above proposition, and holding that the case came
within the rule indicated in *Radde v. Butterfield*, 38
Supr. Ct. R., p. 44.

SEDGWICK, J., concurred.

EDER V. HAUGHWOUT, AND ANOTHER, PLAINTIFFS
AND RESPONDENTS, v. CORNELIUS K. GARRI-
SON AND ANOTHER, DEFENDANTS AND APPEL-
LANTS.

Before SPEIR AND SANFORD, JJ.

Heard February, 1876; Decided March 20, 1876.

C. Bainbridge Smith, for appellants.

Statement of the Case.

Sullivan, Kobbe and Fowler, for respondents.

Appeal by defendants from a judgment entered on the report of a referee. The only question involved was whether the findings of fact were sustained by the evidence.

SPEIR, J., wrote for affirmance.

SANFORD, J., concurred.

GEORGE CARPENTER, PLAINTIFF AND RESPOND-
ENT, v. CHRISTIAN BRAND, DEFENDANT AND
APPELLANT.

INTEREST, FROM WHAT TIME ALLOWED.

Services rendered; interest is allowable from the time the ascertained amount became due.

Before MONELL, Ch. J., and CURTIS, J.

Heard December, 1875; Decided February 7, 1876.

Appeal by defendant from a judgment entered on the report of a referee. Two questions involved: One, that stated in the head-note; the other, whether, under the evidence, the report should not be set aside on the facts.

Benjamin T. Kissam, for appellant.

S. Jones, for respondent.

CURTIS, J., wrote for affirmance.

MONELL, Ch. J., concurred.

Statement of the Case.

ANNIE E. BELL, ADM'X., &C., PLAINTIFF AND
APPELLANT, ALSO RESPONDENT, v. JANE P.
SPOTTS, ADM'X., &C., DEFENDANT AND AP-
PELLANT, AND ALSO RESPONDENT.

EQUITABLE ACTION.

DEFENSE THAT PLAINTIFF HAS A PERFECT REMEDY AT LAW,
WHERE IT MUST BE INTERPOSED.

Must be presented by the *answer*,
otherwise not available at the hearing.

Before SPEIR and SANFORD, JJ.

Heard February, 1876; Decided March 20, 1876.

John E. Parsons, for plaintiff.

F. R. Coudert, for defendant.

This case, in addition to the proposition stated in the head-note, merely involved a question of fact. The cause was tried before a referee; both parties appealed from the judgment. The general term laid down the proposition in the head-note, and held that the referee had correctly decided the question of fact.

SPEIR, J., wrote for affirmance.

SANFORD, J., concurred.

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ABATEMENT.

See ACTION, 4-15.

ACCEPTANCE.

See BILLS OF EXCHANGE, 1, 2;
MARSHALLING ASSETS, 2;
SALES, 1-4.

ACCOUNTING.

See ACTION, 12-15; JUDGMENT,
2, 8.

ACTION.

1. An election by the plaintiff between causes of action, in a proper case, may be obtained by a motion at special term to have the pleading made more definite and certain. *Faulks v. Kamp*, 70.
2. Thus when the allegations of the pleading are such as to leave it uncertain whether the party pleading puts himself on a cause of action founded on the affirmation of a contract therein referred to, or on one founded on a rescission of such contract, he may be compelled to make his election by an order, made on a motion therefor, directing him to make the pleading more definite and certain, so that it shall clearly appear whether he elects to affirm or rescind. *Id.*
3. An application by the representative of a sole defendant,

deceased, to have the action revived and continued, will not be granted unless the deceased defendant had before his death acquired rights or benefits in the litigation. *Republic of Peru v. Reeves*, 816.

4. Where an action was brought to restrain the defendant from using and imitating trade-marks, and selling spurious for genuine articles, and for damages, and, after answer, a temporary injunction was granted on notice to the defendant, and without any opposition from him, and no motion was made by him to vacate or modify the injunction, and the defendant died before the case was tried, *Held*, that a motion made by the administratrix of the defendant that the action be continued against herself as such administratrix should be denied. *Id.*
5. There has been no change in the law as to revivor of actions since the Revised Statutes, except an extension by the Code of a right to a revival, before as well as after trial or interlocutory judgment. *People of the State of New York v. Starkweather*, 453.
6. The test as to whether the action can be revived, both under the Revised Statutes and the Code, is whether the cause of action survives. *Id.*

7. The test of the survivorship of a cause of action is whether the action might be originally brought against the executors. *Ib.*
 8. Where the cause of action is money due, or a contract to be performed, or gain or acquisition by the labor or property of another, or on a promise, express or implied, by the deceased, there it survives. *Ib.*
 9. Where the cause of action is for wrongs to property, rights, or interests, an action may be brought against the representative. § 1, art. 1, title 3, chap. 8, pt. 3, R. S. Such a cause of action survives. *Ib.*
 10. Laws of 1875, chap. 49, Peculation Act, gives the people a right of action for any money or property owned officially by any municipal corporation which has *without right* been obtained, received, converted, or disposed of, and for any damages by reason of such obtaining. *Ib.*
 11. Notwithstanding the words "without right" the action may be regarded as founded on an implied contract, and the people may waive the tort, and bring their action on contract; but even if it is essential under the act to bring the action in tort, basing it on fraud or deceit, or on some other wrong, it would be a wrong to property, rights, or interests; and in either aspect, under above principles, the cause of action would survive, and the people would be entitled to revive against the representative of a deceased defendant. *Ib.*
 12. In an equity action against several defendants for an accounting, on the death of one of the defendants the action survives, and his executors and representatives should be made parties. *Halstead v. Cockcroft*, 519.
 13. The executors or representatives may be brought in as parties by a motion in the action made by them or any other parties interested in the revival. *Ib.*
 14. If the power to direct the continuation of the action *does not exist*, no relief can be afforded; but *if it does exist*, the circumstances which will justify its exercise rests in the legal discretion of the court. *Ib.*
 15. In the case at bar a referee had reported that the plaintiffs were entitled to an account from both of the defendants. In the meantime one of the defendants died. After his death, on application of plaintiff, an order was made discontinuing the action as to the deceased. The surviving defendant appealed from that order, claiming that the executrix of the deceased defendant should be made a party to the action. *Held*, that the order should be reversed, on the ground that the executrix was a necessary party to the action, and should be brought in. *Ib.*
 16. A motion for election between causes of action, should be made before the cause is called on for trial. *American Dock and Improvement Company v. Staley*, 539.
- See ASSIGNMENT, 3; COUNTER-CLAIM; CREDITOR'S SUIT; DEATH; FORECLOSURE; FRAUD; DIVORCE; INTERPLEADER; MALICIOUS PROSECUTION; SALES, 1-4, 15, 16.
- ADJOURNMENT.
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- See APPEAL, 26-30; NEW TRIAL, 5-8
- AGENCY.
- See BROKERS; COUNTER-CLAIM, 4.
- AGREEMENTS.
- See CONTRACTS; STIPULATIONS.

AMENDMENT.

1. Upon a motion for amendment of an answer, by setting up matter alleged to constitute a further defense, it is to be considered whether the matter constitutes a defense or counterclaim. If it does not, the motion may be denied, and the order of denial will not be reversed on appeal. *Whele v. Connor*, 24.
2. Power of the court to require as terms upon amendment of an answer the payment of all costs and disbursements from and after notice of trial, when such terms are eminently just and proper. *Tribune Association v. Smith*, 99.

See CREDITOR'S SUIT, 5; REFERENCE, 2-4; TRIAL, 7-9.

ANSWER.

See AMENDMENT; PLEADING, 8-15.

APPEAL.

1. An objection at the commencement of the examination of an expert in handwriting, to questions designed to show his business, his ability, knowledge, and skill, on the ground of immateriality, is not maintainable on appeal. *Roe v. Roe*, 1.
2. Neither is a general objection "to this class of evidence" maintainable, to questions having such design in view. If subsequent questions and answers exceed the limit to which an expert can testify, further and specific objections should be interposed. *Id.*
3. Overruling an objection to an improper question does not constitute cause for reversal where the answer was proper and competent evidence. *Fagnan v. Knox*, 41.
4. Generally, orders directing a pleading to be made more definite and certain do not affect a substantial right. *Faulks v. Kamp*, 70.
5. Thus, an order directing a pleading to be made more definite and certain so that as between two causes of action contained therein—the one based on the affirmance of a certain contract, and the other on its rescission—it shall clearly appear upon which one the party pleading elects to proceed, does not affect a substantial right. *Id.*
6. An appeal from an order granting relief on terms, taken from that part which imposes the terms, will not lie. *Tribune Association v. Smith*, 81.
7. If improper terms are imposed, the remedy is by appeal from the order as a whole; unless, perhaps, the terms are separated into parts, some of which may be reversed without affecting the others, in which case it may be that such parts as are claimed to be improper, may be reviewed on appeal from them only, and if found erroneous, reversed. *Id.*
8. Upon an appeal to the general term from an order in the discretion of the court below, the general term can not act as if it had the power to entertain the motion originally. Whatever relief, other than the bare reversal or affirmance, either party may desire, must be sought for and obtained at the special term. *Id.*
9. On an appeal from the judgment only, the only questions that can be reviewed are questions of law. An alleged excess of damages found by a jury, and an exception to the decision of a motion for a new trial upon the minutes of the court, can not be considered or reviewed upon such an appeal. *Alfaro v. Davidson*, 87.
10. In an appeal from a judgment only, the refusal of the court (in consequence of plaintiff's objection thereto) to allow the jury to take with them, on re-

- tiement, for consultation, three certain bills which had been received in evidence, is not properly reviewable by the general term. The refusal was a matter resting solely within the discretion of the court. *Harnett v. Garvey*, 96.
11. If an appellant seeks to raise the question of the sufficiency and regularity of a memorandum of the sale made by an auctioneer, and which was proved on the trial without objection, he must procure the same to be incorporated in the case, and thus furnish the court the means of deciding upon its sufficiency. In such a case, the court on appeal must necessarily assume that it was sufficient, and that there was no error of the judge before whom the case was tried, in deciding that the same was sufficient. *Cousinery v. Pearsall*, 113.
12. Upon appeal from an order denying a motion for a new trial made at special term on a case, on the ground that the verdict is not sustained by the evidence, although the point was not raised at the trial, either on a motion to dismiss the complaint, or by a request for the direction of a verdict, yet it may be considered both on the motion and on the appeal, and if the evidence be insufficient, the judgment will be reversed. *Peck v. Cohen*, 142.
13. The power to vacate a judgment is so far discretionary that an order of vacatur will not be reversed unless there was an unmistakable abuse of discretion. *Whele v. Bowery Savings Bank*, 161.
14. What does not show such abuse. *Ib.*
15. That after the affirmance by the general term of a judgment in favor of plaintiff, the court of appeals without writing any opinion, or assigning any reason therefor, has reversed a judgment in favor of a different plaintiff in another action against the same defendant, involving the same facts, and depending on the same law as the action in which the re-argument is sought involves and depends on, does not furnish sufficient ground to call for a re-argument on defendant's application. *Butterfield v. Radde*, 169.
16. A stipulation that the verdict to be rendered in a cause on trial shall control and be conclusive in certain other causes, and that judgment be entered in such other causes accordingly, and that the same evidence, ruling, exceptions, and charges, shall be considered as inserted in such other causes as are in the cause on trial, and shall be as of record in all the causes, in terms applies to the trial only, and its force and effect is spent with the verdict. *Ib.*
17. Therefore the fact that the judgment entered on a verdict for plaintiff in one of the causes mentioned in the stipulation has been reversed in the court of appeals, does not of itself entitle the defendants in the other actions to a reversal of the judgments, and consequently not to a re-argument. But as the spirit and intent of the stipulation was substantially that the untried actions should abide the event of the one which was tried, and therefore under it the defendants in those actions are fairly entitled to obtain the benefit of the decision of the higher court in the case which has been decided there, and as on a re-argument they may satisfy the court that its former decision has been reversed, or is incorrect, and thus get the benefit of the decision of the higher court, a re-argument should be granted. *Ib.*
18. Upon appeal from an order entered on a motion for a new trial on the minutes, where

- there is no conflict in the evidence, the question whether it is sufficient to support the verdict is one of law, and may be considered on such motion, and, if found insufficient, a new trial should be granted. *Halpin v. Third Avenue R. R. Co.*, 175.
19. This although the point was not raised on the trial, either by a motion to dismiss or by motion for a direction of a verdict. *Ib.*
20. *Semble*, all questions that can be raised on a motion for a new trial made on a case at special term, and on an appeal from an order entered thereon, may be raised on a motion for a new trial made on the minutes and on appeal from the order entered thereon; and nothing further is requisite to raise the questions in the latter mode, than is required in the former. *Ib.*
21. An insufficiency in the evidence below, as to the written or unwritten law of another state can not be supplied on appeal; such laws must be proved in the court below. *Lawson v. Pinckney*, 187.
22. Neither the statutes nor the reports of decisions of the courts of such other state (when not proved on the trial) can be considered on appeal for the purpose of determining the law of such other state. *Ib.*
23. When the complaint contains several causes of action, and on the trial the plaintiff obtains a verdict as to all, and judgment is entered accordingly, the general term on appeal may affirm as to those causes of action as to which no error was committed, and reverse and order a new trial as to those in respect to which error was committed, when a separation of the judgment may be made by mere calculation. *Ib.*
24. In such case no costs of appeal should be awarded to either party. *Ib.*
25. An error of calculation in the court below,—such as giving interest on interest,—to which the attention of the court below was not called, will not deprive the respondent of costs, upon affirmance of the judgment on appeal. *Clark v. Geery*, 227.
26. An exception to a decision denying a motion to postpone a trial, is available upon an appeal from the judgment in the case. *Tribune Association v. Smith*, 251.
27. All the facts sworn to that were urged upon the motion, as also all the facts stated orally to the court, upon and in opposition to the motion, are evidence for the consideration of the court on appeal, and are clearly admissible. *Ib.*
28. The party objecting to the postponement of the trial, can require all such statements of facts to be put into the form of an affidavit, and he is not bound to accept them otherwise, if he insists upon their verification. *Ib.*
29. But if oral and unverified statements of counsel are not objected to because they are not in writing, and verified, and such statements are not contradicted, they are competent as evidence, and are entitled to the same credence as if embodied in an affidavit. *Ib.*
30. Where there is a conflict in the proofs before the court below, upon such a motion, the judge is as competent, and better able, to determine the facts than the court on appeal can be, and his decision, like the verdict of a jury, will not be disturbed. *Ib.*
31. Objections not taken at the trial, which might have been lessened or destroyed by evidence, can not be taken for the first time on the hearing of the appeal. *Isaacs v. New York Plaster Works*, 277.
32. Upon a motion for leave to appeal to the court of appeals,

- under ch. 322, Laws of 1874, — *Held*, that the questions involved in the judgment in this action are not such as require the court to certify the case to the court of appeals. None of them bring the case within the rule laid down in *Butterfield v. Radde* (38 *Sup'r. Ct.* 44). *Alfaro v. Davidson*, 289.
33. Upon the appeal from the order denying a motion for a new trial upon the minutes, the order was affirmed by this court without examination of the alleged errors, because the grounds of the motion below did not appear in the order or elsewhere in accordance with *Alfaro v. Davidson* (39 *Sup'r. Ct.* 463). *Held*, that there being a doubt of the correctness of this last decision, the motion, so far as relates to the order affirming the order denying the motion for a new trial, is granted. *Ib.*
34. Where upon a trial a general objection is made to a question stating facts assumed to have been proved, a decision overruling a general objection to such a question can not be impugned on appeal on the ground that there was no proof of the facts on which the question was based. *Gould v. Moore*, 387.
35. Upon the summing up, a reference by counsel to matters not proved, or of which the proof was excluded, is highly improper. It is the duty of the court not to permit it; and it is error to permit it after objection made. But if, on objection, such reference is immediately rebuked by the court, and not persevered in, it is not cause for reversal, unless it was made in bad faith, and might have prejudiced the defeated party. *Ib.*
36. The Code has made no provision for an appeal from an interlocutory judgment. An appeal must be based upon a final judgment, and is governed by § 268 of the Code; or in a case where there was a trial and decision, and an interlocutory judgment, the remedy of a party aggrieved is by a motion for a new trial under the same section (268), and such a motion must be based upon a case made, &c. *Offinger v. De Wolf*, 446.
37. A party aggrieved by an interlocutory judgment, after a trial, can not be relieved on a motion to vacate or modify such a judgment. He must move the court at general term for a new trial, &c. *Ib.*
38. An order setting aside, on terms, an inquest taken for want of an affidavit of merits, when one is required, is in the discretion of the court at special term, and can be reviewed only when it appears that there was an abuse of discretion. *Lehmaier v. Griswold*, 542.
39. One of the reasons for the rule that the court will not disturb a verdict on conflicting evidence is that though the court may draw a different conclusion from the evidence submitted upon the printed papers from what the jury did, yet it must be considered that the latter had the advantage of seeing the manner and appearance of the witnesses, as well as of hearing their statements, and that is a circumstance to which the law attaches importance. *Hanck v. Stephenson*, 543.
40. Where a cause is reserved generally on the trial calendar, a defendant who has answered separately and by a different attorney is entitled to two days notice to place it on the day calendar. A default taken without such notice is irregular, and an order denying a motion to set aside such default will be reversed on appeal. The court below should have exercised its discretion in opening the default. *Seaman v. McReynolds*, 545.
41. A notice of appeal signed "of counsel" is irregular; but

the general term may correct it by substituting "attorney" for "counsel." *Ib.*

42. Appeal does not lie from a judgment entered upon a referee's report made in conformity with a stipulation entered into by the parties and their attorneys, after evidence adduced on both sides, and rulings made to which exceptions had been taken. *Ettlinger v. Silberstein*, 546.

43. Remedy for violation of stipulation must be sought at special term. *Ib.*

44. Leave to appeal to the court of appeals will be granted where there are numerous other claims against the defendant involving the same questions. *Fischer v. Hope Mutual Life Ins. Co.*, 550.

See COSTS, 1, 2; TRIAL, 2, 3, 11-13.

ARTICLES OF ASSOCIATION.

See CORPORATIONS, 16.

ASSESSMENTS.

See CORPORATIONS, 5.

ASSIGNMENT.

1. When an order to pay an installment under a contract when due, and notice of same, operates as an assignment or appropriation of the installment, so far as any such order or notice must be regarded as binding upon or appropriating the fund, or part of the fund, it can not by any legal construction be extended or postponed to any other or subsequent payment or installment than the one specified in the order. *Schreyer v. Mayor, &c. of New York*, 255.
2. Such an order is at the most only a mere equitable assignment of a part of a future fund, and does not operate upon the same until accepted by the drawee. Judgment of the court

below corrected, by adding to it the amount the plaintiff should have recovered, in accordance with 35 *Sup'r. Ct. R.* 423, affirmed by court of appeals, 55 *N. Y.* 452. *Ib.*

3. In an action by an assignee the date of assignment of the claim sued on is immaterial, when the evidence clearly shows that it was made after the rendition of the services, the claim for which was assigned. *Nettleton v. Matthews*, 543.

See BILLS OF EXCHANGE, 3-7; EVIDENCE, 15; PLEADING, 8.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. A conveyance made by an insolvent of premises to an assignee, under and by virtue of the statute relating to involuntary assignments, &c., &c., and for the consideration of one dollar, is *prima facie* evidence of title to the premises, and should be received in evidence, and properly preceded in the order of proof the evidence of the other proceedings under the statute. *Rockwell v. McGovern*, 118.
2. Proof following such conveyance, to the effect that all the proceedings in insolvency, under the statute of which this conveyance formed a part, were null and void, destroys the effect of the deed, and the same is null and void. *Ib.*
3. In such case, the conveyance must be considered as a mesne assignment under the proceedings, and if the latter were null and void, the former was also null and void. *Ib.*
4. If the proceedings were void for want of jurisdiction, the deed or assignment must fall with them. *Ib.*
5. The assignment was not voluntary; it was involuntary in its character, and given by the assignor to obtain his discharge

in these proceedings, and in case of the later being void, the assignment or conveyance fails for want of consideration, for the "one dollar" consideration will be deemed to be merely formal, and does not change the character of the deed. *Ib.*

BAILMENT.

Where the owner of personal property makes a contract with his bailee whereby the bailor is not bound to deliver the property except on the written order of such owner, the bailee can not justify a refusal to deliver to a person succeeding to the ownership on the ground of non-presentation of a written order of such former owner. *Willner v. Morrel*, 222.

See CARRIERS.

BILLS OF EXCHANGE.

1. A promise to accept a bill of exchange, under R. S. pt. 2, ch. 4, title 2, § 8, may be transmitted by a telegram written and sent by the promissor. *Molson's Bank of Montreal v. Howard*, 15.
2. To constitute an unconditional promise to accept, under the statute, the time the bill is to run need not be specified—*e. g.*, "To A—Will accept twenty-five gold or three thousand currency, on usual time, B,"—is an unconditional promise, the time of drafts drawn in previous transactions of the same kind between the parties being proved. *Ib.*
3. An agreement by A to deliver to B goods from day to day for a period extending over several months, and by B to pay for such goods on the first day of each month in drafts drawn by A on B at twenty days' sight, does not restrict A to drawing on the first of each month but a single draft for all the goods delivered during the preceding month, and does not require, as a con-

dition precedent to the obligation to pay, that there should be a demand for the payment of such drafts. *Patterson v. Stauter*, 54.

4. Where drafts drawn under such an agreement as the above, generally on the vendee for part payment of goods delivered, are delivered by the drawer to a third person, and re-delivered by him to the drawer, such delivery does not operate as an assignment *pro tanto* of what was due to the drawer under the contract, or of the drawer's rights and interests thereunder. This, although the agreement provided that the drafts should be endorsed as correct by a person specified in the agreement, and the same were so endorsed. *Ib.*
5. The re-delivery to the drawer would operate as a re-assignment of what was originally transferred. If the delivery operated to divest the drawer of any cause of action he then had, the re-delivery would operate to re-invest him therewith. *Ib.*
6. To sustain a finding of presentment of a draft for acceptance, proof of repeated promises by the drawees to pay the draft is sufficient; it not appearing that the promise was made under a mistake as to the fact, or from a benevolent motive, or moral and not legal obligation. This although the drawees testify that the draft was not presented. *Ib.*

See ASSIGNMENT, 1, 2; DAMAGES, 12, 13; MARSHALLING ASSETS, 2, 8; PLEADING, 9-11; SALES.

BILLS OF SALE.

See SALES, 14.

BROKERS.

1. Where it appeared from the contract between the parties that plaintiff's compensation as

- a broker depended upon actual sale of a certain bond and mortgage, it may be well questioned whether the procurement of a purchaser who was able and willing to purchase the same, is a fulfillment of the contract by the broker. *Barnes v. Barker*, 102.
2. But in the case at bar, where it appeared that although the plaintiff procured a purchaser who was able and willing to purchase the same, provided the time of payment was shortened several years, and there was no evidence that the mortgagor consented to this change, and the fact was conceded that no sale took place, in such a case the plaintiff did not procure a purchaser under the contract, and was not entitled to recover any compensation. *Id.*
3. Judgment reversed, in an action to recover a broker's commission on sale of real estate, on the single ground that the plaintiff's case was not supported by a preponderance of proof, and the verdict was against the evidence. *Journey v. Tallman*, 436.

BURDEN OF PROOF.

See PRINCIPAL AND SURETY, 6, 7;
WITNESSES, 8-5.

BY-LAWS.

See CORPORATIONS, 6.

CALENDAR.

See APPEAL, 40; TRIAL, 20, 21.

CARRIERS.

1. To establish negligence on the part of a carrier of passengers, something more must be shown than a probability that the carrier was negligent; there must be some element of moral certainty and exclusion of reasonable doubt. *Payne v. Forty-*

second Street and Grand Street Ferry R. R. Co., 8.

2. See opinion for an example of a case not falling within this rule, where the case is stated as shortly as it is possible to state it. *Id.*
3. When the passage ticket calls for a passage by a particular route, and there are letters on the check attached to the baggage of the passenger, indicating that it is to go by the route called for by the passage ticket, and the baggage is transported, not by that route, but by a road not forming a part of such route, no contract by the road not forming a part of such route, can be deduced from the fact that baggage with similar checks has frequently been carried over it. *Fairfax v. New York Central and Hudson River R. R. Co.*, 128.
4. Such facts do not establish the check to be the regular check of the company whose road does not form part of the route, or that it was put by such company or its agent on baggage intended for transportation over its road. *Id.*
5. If the owner of baggage omits to call for it within a reasonable time after its arrival at its place of destination, the liability of the carrier as carrier will cease, and that of warehouseman attach. *Id.*
6. A space of three days is not a reasonable time. *Id.*
7. Where a piece of baggage was placed in the usual baggage-room, which was an inclosed room, in charge of a baggage-master, to which no one was allowed access except in the presence of such master, and remained there for some days, and was seen shortly before the owner demanded, but could not be found when the demand was made, *Held*, 1. That the warehouseman was not liable. 2. He was not bound to show in

what manner or by whom it was taken from the baggage room, nor to account for it. 8. Even if it were feloniously taken by a stranger, or one of the defendant's servants, yet the warehouseman not being negligent, such taking would not create a liability. *Id.*

8. The case at bar having been tried four times in the court below, and having been reviewed three times by the court of appeals (3 *Jones & Spencer*, 182; 53 *N. Y.* 652; 56 *N. Y.* 168; 6 *Jones & Spencer*, 248; 60 *N. Y.*), on the last trial, now in review, the judge submitted to the jury the question as to whether the defendant was guilty of gross negligence or misfeasance or abandonment, in the course of its duties as carrier, and charged, that if the jury found it was so guilty, then the plaintiffs were entitled to recover the value, with interest, of the goods shipped. *Held* by the court, that the evidence did not warrant this submission as to gross negligence, &c. *Magnin v. Dinsmore*, 512.
9. See the opinions on the review of this and the former questions before this court and the court of appeals. *Id.*

CASES CRITICISED.

- Benson v. Mayor, &c.*, 10 Barb. 223. Reviewed and explained. *Mayor, &c. of New York v. New York and Staten Island Ferry Co.*, 232.
- Burhans v. Tibbitts*, 7 How. Pr. 21. Followed. *Hersberg v. Murray*, 271.
- Butterfield v. Radde*, 38 Supr. Ct. 44. Followed. *Alfaro v. Davidson*, 289.
- Canaday v. Stiger*, 35 Supr. Ct. 423. Followed. *Schreyer v. Mayor, &c. of New York*, 255.
- Carnes v. Platt*, 36 *N. Y. Supr. Ct.* 361. Overruled in part.

- Halpin v. Third Avenue R. R. Co.*, 175.
- Chamboret v. Cagney*, 2 Sweeney, 385. Followed. *Lehmair v. Grinsold*, 100.
- Day v. Pool*, 52 *N. Y.* 416. Distinguished. *Cahen v. Platt*, 483.
- Devendorf v. West*, 42 Barb. 227. Followed. *Alfaro v. Davidson*, 87.
- Dounce v. Dow*, 57 *N. Y.* 16. Distinguished. *Cahen v. Platt*, 483.
- Ellis v. Andrews*, 56 *N. Y.* 83. Followed. *Furman v. Titus*, 284.
- Fallon v. Mayor, &c.*, 4 Hun, 583. Followed. *Boller v. Mayor, &c. of New York*, 523.
- Ford v. Mayor, &c.*, 4 Hun, 587. Followed. *Boller v. Mayor, &c. of New York*, 523.
- Fox v. Meyer*, 54 *N. Y.* 125. Reviewed. *Miller v. Hall*, 262.
- Gaines v. Stiles*, 14 Peters, 323. Followed. *Rockwell v. McGovern*, 118.
- Gregg v. Howe*, 37 Supr. Ct. 420. Followed. *Tribune Association v. Smith*, 251.
- Homan v. Brinkerhoff*, 1 Denio, 184. Followed. *Rockwell v. McGovern*, 118.
- Isaacs v. Third Avenue R. R. Co.*, 47 *N. Y.* 122. Distinguished. *Cohen v. Dry Dock, East Broadway and Battery R. R. Co.*, 368.
- McVickar v. Greenleaf*, 4 Rob. 657. Approved. *Glenny v. World Mutual Life Ins. Co.*, 92.
- Mages v. Osborn*, 32 *N. Y.* 669. Followed. *Alfaro v. Davidson*, 87.
- Milhau v. Sharp*, 27 *N. Y.* 619. Followed. *Mayor, &c. of New York v. New York and Staten Island Ferry Co.*, 232.
- Morris v. Ward*, 36 *N. Y.* 587. Followed. *Rockwell v. McGovern*, 118.
- Newton v. Wales*, 3 Rob. 453. Followed. *Isaacs v. New York Plaster Works*, 277.
- Parker v. Jervis*, 3 Keyes, 271. Followed. *Alfaro v. Davidson*, 87.

- People v. Mayor, &c.*, 32 Barb. 102.
Followed. *Mayor, &c., of New York v. New York and Staten Island Ferry Co.*, 232.
Rove v. Stevens, 34 N. Y. Supr. Ct. 436. Overuled in part.
Halpin v. Third Avenue R. R. Co., 175.
Sayre v. Jewett, 12 Wend. 135. Followed. *Hersberg v. Murray*, 271.
Shipman v. Burrows, 1 Hall Supr. Ct. 411. Approved. *Jutte v. Hughes*, 126.
Vose v. Cockcroft, 44 N. Y. 415. Followed. *Rockwell v. McGovern*, 118.
Winston v. English, 35 N. Y. Supr. Ct. 512. Approved.
Glennay v. World Mutual Life Ins. Co., 92.

COMMON CARRIERS.

See CARRIERS.

COMPLAINT.

See APPEAL, 23; COUNTER-CLAIM, 1; DAMAGES, 1-6; PLEADING, 1, 2; SALES, 3, 4.

COMPROMISE.

See EVIDENCE, 3.

CONTEMPT.

See INJUNCTION, 4-7.

CONTRACTS.

1. To constitute an agreement in writing within the meaning of the statute of frauds, a letter of the party to be bound, delivered to the other party, which states the consideration and the indebtedness, and accepted and acted upon by the latter party, is sufficient. *Napier v. French*, 122.
2. Where the indebtedness existed at the time the letter was so delivered and acted upon, by virtue of a previous parol agree-

ment, the letter is the written agreement, and was the consummation of the previous verbal arrangement, and is in fact and in law the actual agreement between the parties, and the time of its execution and delivery being at a later date than the verbal arrangement, does not affect its validity. *Ib.*

3. Special clauses contained in the heading to a receipt, when the receipt is not given until some time after the transactions evidenced by it have occurred, and it nowhere appears that the receiptee, or the party claiming under him, at the time of the giving of the receipt, assented to the special clauses, will not constitute a contract, although they in form purport to be such. *Willner v. Morrell*, 222.

4. The heading to a receipt contained the following clauses among others: "No goods delivered without a written order, or presentation of original receipt." "Goods will not be delivered to any person unless identified and authorized to receive the same." *Held*, that upon the demand by a vendee of the party who stored the goods, the original receipt being presented, and he being accompanied by the person who in the matter of the storage acted for the party who stored the goods, and who was there to identify the person making the demand as being the vendee, the above clauses did not warrant a refusal to deliver. *Ib.*

5. It was unnecessary to produce a written order. *Ib.*

See ACTION, 2, 11; APPEAL, 5; ASSIGNMENT; BAILMENT; BROKERS; CORPORATIONS, 1-4; DAMAGES, 1-3; DEEDS; EVIDENCE, 4, 5; INSURANCE; LEX LOCI; PLEADING, 1, 2; PRINCIPAL AND SURETY; RECEIVER, 1; SALES.

CONVERSION.

See DAMAGES, 12, 13; PLEADING, 3-5, 9-11.

CORPORATIONS.

1. Upon the assumption by one corporation, A., of all debts, liabilities, and obligations of another, B., the assuming corporation, A., is not bound to perform a contract made by B. to transfer shares of its (B.'s) stock by transferring an equal number of shares of its (A.'s) stock; nor is A. in any event liable as and for damages for the breach of such contract made by B., or otherwise, in the value of an equal number of shares of its (A.'s) stock. *Conant v. National Ice Co.*, 83.
2. This although the consideration for such assumption was the transfer by B. to A. of all the property, rights, and privileges of B. *Ib.*
3. And although the stock of the old company was to be delivered in payment for services rendered in procuring some of the property so transferred. *Ib.*
4. And although the individuals who organized the new company were the same who organized the old one, the offices of the one the same as those of the other and filled by the same persons, the seal of the one the same as the seal of the other, and the two corporations in all other respects alike, and all the property of the old company was transferred to the new one. *Ib.*
5. The validity of the sale of corporate stock by the corporation for non-payment by the owner thereof of an assessment by the directors of the company upon such stock depends upon the same being made strictly within the powers authorizing the same, namely: the law of the state wherein the corporation exists, and the charter and by-laws of the corporation. *Mitchell*

v. Vermont Copper Mining Co., 406.

6. A corporation cannot enact or pass a by-law, or any rule or resolution for its government, except within the state under whose laws it is organized, and where it has a corporate existence. *Ib.*
7. To establish a corporation de facto, the mere acting as a corporation, no matter for how long, is not of itself sufficient. *De Witt v. Hastings*, 463.
8. In addition to so acting, either a charter or law which of itself creates, upon its acceptance, a corporation, is necessary; or, if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, some of those regulations and forms must have been observed, although others have been omitted. *Ib.*
9. How much must be done, or how much may be omitted, has not been decided. *Ib.*
10. Where a statute provides that upon filing in a county clerk's office a certificate of a specified character, and a duplicate thereof in the office of the secretary of state, the persons who shall have signed and acknowledged the certificate, and their successors, shall be a body politic and corporate in fact and in law, the filing in the office of the secretary of state a certificate of the specified character, without any certificate whatever being filed in any county clerk's office, is a sufficient compliance for the purpose of, with proof of user under it, establishing a corporation de facto. *Ib.*
11. The acts relied upon to establish user must be in their nature corporate acts, not speaking as much for non-incorporation as for incorporation. Acts of individuals which would not be corporate acts if there were a charter will not be acts of user. *Ib.*

12. Acts done before the doing of anything in the legal formation of the company, those not falling within the object for which the company was to be formed, and those done by persons not acting within the scope of any authority conferred by the parties associated together in the formation of the company, are not acts of user. *Ib.*
 13. User will not raise a corporation de facto, as against one who has not taken any part in the acts of user, when the contest is between third parties. *Ib.*
 14. Issuing a certificate of stock is not necessarily an act of user as against the party to whom it is issued. *Ib.*
 15. It is not such act of user when it is an isolated act, unaccompanied by any other use of corporate powers, and contemporaneous therewith there were acts from which a jury might find a disclaimer by the party to whom it was issued and who is sought to be made liable thereby. *Ib.*
 16. Where articles of association name a party as trustee, the signing of the articles by such party only holds him to the obligations of an officer to carry on the corporate business provided the articles are used to form a corporation de facto. *Ib.*
 17. Issue to and receipt by a subscriber to the stock of a corporation of a certificate of stock does not estop him from denying the incorporation. Such issue and receipt are to be looked upon simply as bearing on the inquiry, whether in fact corporate franchises were used. *Ib.*
- he is entitled to such costs as the Code prescribes. *Wehle v. Bowery Savings Bank*, 164.
2. The question as to whether the order should have given costs can be raised only on appeal from the order itself. *Ib.*
 3. The right of several successful defendants to separate bills of costs, depends on the provisions of § 806 of the Code, as amended in 1851, which regulates the whole subject, and confines the right to separate bills to the cases therein expressly mentioned, to the exclusion of all others. *Pierce v. Brown*, 898.
 4. In an action for damages against two defendants who originally appeared and answered by the same attorney, but by separate answers, and subsequently another attorney was substituted for one of the defendants, and thereafter the complaint was dismissed as to both,—*Held*, that the decision of the taxing officers that separate bills could be allowed, was correct. *Ib.*
- See AMENDMENT, 2; APPEAL, 24, 25; EJECTMENT; EVI-DENCE, 18; GUARANTY.

COUNTER-CLAIM.

1. Where the summons is for relief, and the complaint alleges a conversion of property, the character of the action is determined by the complaint, and is an action for a tort. *Lehmair v. Grisnold*, 100.
2. A counter-claim in such an action, to be available, must arise out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or it must be connected with "the subject of the action." *Ib.*
3. The words "the subject of the action" mean "the facts constituting plaintiff's cause of action." *Ib.*
4. Where a factor (L.) entrusts

COSTS.

1. Upon the substitution of a party defendant, when the order of substitution gives the defendant the costs of action,

goods of his principal (W.) to an agent (A.) for sale, such agent knowing that L. was the factor of W., A. can not, in an action against him by L. to recover the proceeds of the goods which had been sold by him, set off a counter-claim, an individual indebtedness due from L. to him. *Ladd v. Arkell*, 150.

See PLEADING, 18, 14.

COURT OF APPEALS.

See APPEAL, 15-17, 32, 44.

CREDITOR'S SUIT.

1. In an action to recover property alleged to have been conveyed by a party with intent to delay and defraud her creditors, the party who conveyed the same is a necessary party defendant in the action, as well as the person claiming to own the same under and by virtue of such conveyance. The cases adjudged before and since the adoption of the Code fully reviewed in the opinion of the court. *Miller v. Hall*, 262.
2. The case of *Fox v. Moyer*, 54 N. Y. 125, reviewed in regard to its bearings upon this and other like cases. *Ib.*
3. In an action in the nature of a creditor's bill to reach a chose in action, which could not be reached at law, especially where the interest to be reached is a chattel interest, the judgment debtor is a necessary party to said action. *Ib.*
4. Where judgment was obtained by a creditor of a partnership composed of three partners, in an action against all, but on a service of the summons on but two, and was in form a judgment against those two only, and the execution was issued against all three, and returned unsatisfied, — *Held*, that an action by the judgment creditor, on his own behalf and

behalf of all other judgment creditors, to set aside an alleged fraudulent assignment of the partnership property, made by all three partners, for a receiver of the assigned property, and for the payment of his debt, could not be maintained, because the remedy at law, by judgment and execution returned unsatisfied against the three, had not been exhausted. *Produce Bank of New York v. Morton*, 328.

5. An amendment granted at the trial amending the judgment *nunc pro tunc* by adding the name of the third partner, as one of the parties against whom judgment was rendered, will not cure the defect. *Ib.*

See JUDGMENT, 1.

CURRENCY.

See DAMAGES, 11, 14.

DAMAGES.

1. In an action to recover damages upon a breach of a contract the plaintiff is entitled to recover such as necessarily flow therefrom. These are general damages and need not be expressly detailed in the complaint, but are recoverable under the general conclusion. *Alfaro v. Davidson*, 87.
2. To recover special damages, they must be set forth or detailed specially in the complaint. Upon proof of a breach of a valid contract, the plaintiff is entitled to recover some damages, although it may be difficult to ascertain the same, and they may be merely nominal. *Ib.*
3. Past profits may be proved as a basis for the estimation of probable profits if the contract had been fulfilled, and upon the same principle (as in the case at bar), facts and circumstances occurring after the breach and to the expiration of the time provided

- for in the agreement, which show or tend to show the profits that would have necessarily accrued under the agreement if kept, or the losses that were occasioned by its breach, may be proved. *Ib.*
4. In order to recover special damages, they must be averred in the complaint, else they can not be proved on the trial. *Jutte v. Hughes*, 126.
 5. In the case at bar, the action was to recover damages for the overflow of water into the cellars of the plaintiff from the premises of defendant, caused by the defective sewerage of defendant's privies and drains. The plaintiff offered to prove special damage, caused by the loss of rent on his premises, the tenants leaving because of the condition of the cellars, &c. The court refused to receive this evidence because there was no claim set up in the complaint for loss of tenants, &c. The only exception of the defendant that was heard and considered, on the appeal, was to this ruling, and the charge of the judge in reference thereto. *Ib.*
 6. The earliest decision of this court on this subject (*Shipman v. Burrows*, 1 *Hall's Sup'r. Ct.* 411), referred to, and approved. *Ib.*
 7. When one consigns goods to a house here, to be sold in England through their house there, and the house there sells the goods at a certain price in the currency of England, but the house here refuses to pay over the proceeds, in an action brought here by the consignor against the house here, current rate of exchange can not be allowed as damages. *Ludd v. Arkell*, 150.
 8. In reducing the value of a pound sterling into the currency of the United States, the premium of gold at some fixed period must be ascertained. *Ib.*
 9. In actions on contract the time when the debt or demand became due and payable should be taken. *Ib.*
 10. Interest is allowable, almost as matter of right, from the time the debt or demand becomes due,—*e. g.*, from the time of the rendition of the account of sale. *Ib.*
 11. In the case at bar,—*Held*, that plaintiff was entitled to have the sterling pound turned into gold at the time of the rendition of the account of sales, at the rate of \$4.44 to the pound, then to have the currency value of gold at that time determined, and to recover the amount of such currency value, with interest thereon from that time. *Ib.*
 12. In an action for the conversion of a chose in action, such as a promissory note, bill of exchange, &c., the measure of damages *prima facie* is the amount due upon it. *Cothran v. Hanover National Bank of New York*, 401.
 13. In mitigation of damages it may be shown to be of little or no value by reason of the insolvency of the parties, or for any other cause. *Ib.*
 14. Where by a contract of sale the price is to be paid in the currency of a foreign government, but damages for a breach are to be measured by the difference between that price and the market value at a place within the United States, where there are two kinds of currency, one of gold and one of paper, the latter being the universally adopted medium, the party recovering the damages is entitled to have them estimated on the basis of the paper currency, although its value at that place is capable of being estimated in the foreign currency. *Cohen v. Platt*, 483.
 15. In an action for services rendered, interest is allowable from

the time the ascertained amount became due. *Carpenter v. Brand*, 551.

See MALICIOUS PROSECUTION, 9, 10; NEW TRIAL, 8, 4; PRINCIPAL AND SURETY; SALES, 19-21.

DEATH.

1. To maintain an action for damages for death caused by negligence, special pecuniary damage is not necessary. *Byall v. Kennedy*, 347.
2. Such an action can be brought only by a representative of the deceased appointed by a court having jurisdiction. *Id.*

See ACTION, 3-15.

DEEDS.

1. In construing the description, in a deed of the premises conveyed thereby, the intention of the parties is to be ascertained, not only by the language of the description in the deed itself, but by reference to extrinsic facts, which may consist of contemporaneous writings relating to the same subject, of prior deeds through which the title has come down, and writings contemporaneous therewith, and circumstances relating to the premises described in them, and of the facts of undisturbed use on the one hand, and unqualified acquiescence on the other. *Putzel v. Van Brunt*, 501.
2. The clause, "thence, 1,009 feet to a monumental stone marked 'K,' placed in the easterly side of the Eastern Post Road aforesaid, thence along the easterly side of said road," being part of the description contained in a deed of a part of the Turtle Bay Farm in the city of New York,—*Held*, upon above principles, that under the facts appearing in the evidence the deed carried the grantee to

the centre of the Eastern Post Road. *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

DEFAULT.

See APPEAL, 40; JUDGMENT, 2, 3.

DEFENSES.

See AMENDMENT, 1; COUNTERCLAIM; PLEADING, 3-15; RECEIVERS, 2; SHERIFFS.

DELIVERY.

See EVIDENCE, 4, 5; SALES, 12, 15, 18, 20, 21.

DEMURRER.

See PLEADING, 6, 7.

DEPARTMENT OF DOCKS.

See NEW YORK CITY, 7, 8.

DEPOSITIONS.

A deposition taken in an action against co-partners before one of the defendants has appeared (who subsequently appeared and answered), but after the others had appeared and answered, is admissible on the trial of the issues formed by the answers as against those who had appeared and answered at the time it was taken, and being so admissible must affect the one who had not then appeared, to the same extent as it would have affected him as a partner of the others if he had not appeared at all. *Patterson v. Stettlauer*, 54.

DISCONTINUANCE.

See ACTION, 15.

DISMISSAL OF COMPLAINT.

1. In considering the evidence, upon motion to dismiss the complaint, every intendment and fair and legitimate inference and presumption must be made in plaintiff's favor. *Fairfax v.*

New York Central & Hudson River R. R. Co., 128.

2. If there is any conflict of evidence as to any material question of fact ; or if, in respect to any such question, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, it is error to take the case from the jury. *Ib.*

See JUDGMENT, 1; NEGLIGENCE, 9.

DISPOSSESSION.

See SUMMARY PROCEEDINGS.

DIVORCE.

In an action for divorce a *vinculo matrimonii*, the defendant, under the act of 1867 (Laws of 1867, ch. 887) is incompetent as a witness for any purpose other than proving the fact of marriage. *Roe v. Roe*, 1.

DOMICIL.

1. The domicile and habitation of an infant follows that of its father, and after the death of the father that of its mother, in the absence of fraud, until her re-marriage. *Ryall v. Kennedy*, 347.
2. Being at a place is prima facie evidence of a domicile at that place. *Ib.*
3. Where one came to the city of New York as an emigrant, and resided there for seven months, when he was joined by his wife and children, except one which died on the voyage, and he and his family continuously resided in the city of New York for five years.—*Held*, that he was an inhabitant of the city of New York at the time of the death of the child which died on the voyage, the prima facie evidence not having been in any way refuted. *Ib.*
4. Upon above principles, the child at the time of its death was an inhabitant of the county of New

York, although it had never been within the county. And the surrogate of New York had jurisdiction to grant letters of administration on its estate. *Ib.*

EJECTMENT.

Upon a new trial, under § 87, title 1, chap. 5, part 3, *R. S.*, providing that the court in which judgment shall be rendered in an action of ejectment, shall within three years thereafter, upon the application of the party against whom the same was rendered, and upon payment of all costs and damages recovered thereby, vacate such judgment and grant a new trial, the party in whose favor such new trial is granted, can not, upon recovery of a judgment therein, tax as part of his costs the costs for proceedings had before the granting of the order for a new trial. *Carnes v. Platt*, 205.

ELECTION BETWEEN CAUSES OF ACTION.

See ACTION, 1, 2, 16; APPEAL, 5.

ERROR.

See APPEAL, 25.

ESTOPPEL.

The doctrine, rules, and principles of, and the cases affecting, estoppel, created by a former adjudication, most ably and thoroughly reviewed and considered by the court. *Boller v. Mayor, &c. of New York*, 528.

See CORPORATIONS, 17.

EVIDENCE.

1. In proving hand writing by comparison, the writing of the document in dispute alleged to have been written by a witness on the stand may be compared with the writing of words contained in a document written

- by such witness while on the stand. *Roe v. Roe*, 1.
2. Upon the examination of an expert upon a question of handwriting, he may testify to the condition and appearance of the words, and of the letters and characters, contained in the writings, and point out and explain similarities and differences. *Ib.*
 3. An offer of compromise is not admissible in evidence, though the party sued was the one who made the offer, and before making it had investigated the matters out of which the suit arose, and at the time of making it, neither admitted nor denied his liability. *Payne v. Forty-second Street and Grand Street Ferry R. R. Co.*, 8.
 4. An instrument is presumed, in the absence of proof to the contrary, to have been delivered on the day of its date—*e. g.*, a check will be presumed to have been delivered on the day of its date. *Peck v. Cohen*, 142.
 5. A check dated October 10, was given to pay interest falling due September 1, on a bond and mortgage; the check was probably handed to the book-keeper of the agent of the holder of the bond and mortgage; the book-keeper was not examined as a witness; the agent testified that the interest was paid on September 1; that there was no indulgence or extension; that he received no check for the payment of interest in October; that he had never seen the check before the trial. But it appeared that the check dated October 10 was received for the September interest, and that the interest was not in fact paid until that check was paid. *Held*, insufficient to establish that the check was received prior to October 10. *Ib.*
 6. A certificate of a notary public of another state of the protest, &c., of notes payable in such other state, if such certificate is authorized and required by the laws of that state, is competent evidence as to the matter in respect whereof it is so authorized and required. *Lawson v. Pinckney*, 187.
 7. The competency of such a certificate as evidence is not limited by the laws of this state to cases where the defendant fails to annex to his answer an affidavit that no notice of protest or presentment was ever given to him. *Ib.*
 8. If the statutes of another state prescribe the form of the notarial certificate, or that it shall contain certain matters, and then that a certificate in such form, or containing such matters shall be proof of presentment, refusal to pay, and notice to indorsers, such a certificate will be proof of such matters in this state. *Ib.*
 9. If there are no such statutes, the notarial certificate must set forth the facts, showing the manner in which the note was presented and payment demanded, and notice thereof given, specifying the acts done by the notary; and if the facts thus specified show either a presentment or demand, or giving of notice in any mode other than as recognized by the common law, or the statutes of this state, then either the certificate must in some way show that the mode adopted was according to the laws of such other state, or the law of such state authorizing the mode adopted must be proved as a fact on the trial. *Ib.*
 10. A certificate containing the words "of all which I duly notified the indorsers," is not sufficient under the common law or the statutes of this state. *Ib.*
 11. In an action in this state against the indorsers of a promissory note, payable in Penn-

sylvania, the plaintiff, to prove presentment, refusal to pay, and notice to the indorsers, read in evidence (under objection) a notarial certificate made by a notary public of the city of Philadelphia, certifying that he had made due presentment of the note, and that payment was refused, whereupon he did protest, &c., "of all which I duly notified the indorsers." He also read in evidence a statute of the state of Pennsylvania, passed Dec. 14, 1854, printed in the laws of that state for 1855, at p. 724; that statute did not prescribe the mode of serving notice, nor did it make a certificate of the form of the one in question, proof or evidence of the service of notice; there was no proof at the trial, either by the reading in evidence of the statutes, or the reports of cases decided by the courts of that state, or otherwise, either that a certificate like the one in question was by the law of that state proof or evidence of the service of notice, or as to what mode was prescribed by the law of that state for the service of notice. The complaint contained five causes of action; three on promissory notes payable in Philadelphia, as to which the aforesaid notarial certificate was read in evidence, and two on checks drawn on a bank in the city of New York, as to which said certificate had no effect. Plaintiff had a general verdict on all the causes of action for four thousand eight hundred and fifty-seven dollars and seventy cents; but by computation it was easily ascertained how much of this was on the causes of action on the checks, and how much on the causes of action on the notes. *Held*, upon a review of the acts of this state (ch. 309, *Laws of 1865*; ch. 141, *Laws 1835*; and ch. 271, *Laws 1833*) and of the

Pennsylvania act read in evidence, that the certificate was not evidence or proof of service of notice; and therefore its reception was error. *Ib.*

12. *Held further*, that by reason of this error the judgment, so far as it proceeded on the causes of action upon the notes, should be reversed and a new trial ordered. But, as the error did not affect the recovery on the causes of action on the checks, the judgment, so far as it proceeded on them, should be affirmed. *Ib.*

13. *Held further*, that neither party should have costs of appeal. *Ib.*

14. As to the distinction between proof and evidence, see opinion of SEDGWICK, J. *Ib.*

15. Upon the issue as to whether plaintiff, an attorney, or a third party against whom defendant has a defense, is the real party in interest, the action being for a foreclosure of a mortgage, evidence that the plaintiff, while acting as attorney for one W. G., to whom the mortgagor had conveyed the mortgaged property, in an action brought against him by the executors of I. G. (defendants in the foreclosure suit), affecting the title to the mortgaged property, and which suit resulted in a judgment directing W. G. to convey to W. L. (also a defendant in the foreclosure action), as receiver for the executors of I. G., the mortgaged premises, took an assignment of the mortgage; and that while W. G. was the owner of the equity, one W., his son-in-law, had made payments to the B. & M. on his behalf, then ceased and put the mortgagee off, and finally told the mortgagee that the plaintiff had the money, appointing with him a time to go and see the plaintiff, and that W. and the mortgagee went to the plaintiff, who paid

the consideration, and took the assignment, is not sufficient to establish that the assignment was taken for the benefit of W. G., or to put the plaintiff on explanation. *Clark v. Geery*, 227.

16. In an action by an architect to recover the value of services, plaintiff claimed that there was a usual and customary rate of compensation for the services of an architect, and introduced evidence to show that such rate was five per cent. on the cost of the building. *Held*, that defendant, for the purpose of showing that the rates were not uniform, might prove the highest price he had ever paid for the same kind of work performed by the plaintiff, the highest as well as the lowest cost of any house built by him, and what the services of an architect paid for by him included. *Harrison v. Tinker*, 544.

See APPEAL, 21, 39; DEPOSITIONS; DISMISSAL OF COMPLAINT; FORECLOSURE; INSURANCE, 7-9; MALICIOUS PROSECUTION; NEW TRIAL, 3, 5, 8; PRINCIPAL AND SURETY, 6, 7; SALES, 8; WITNESSES.

EXAMINATION.

See PRACTICE; SUPPLEMENTARY PROCEEDINGS, 4-6; TRIAL, 1, 10; WITNESSES, 3-7.

EXECUTION.

When the execution has been revived within five years after entry of the judgment, and returned unsatisfied in whole or in part, a second execution can be issued without leave of the court. *Wade v. De Leyer*, 541.

See SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

See ACTION, 4-15; DEATH, 2.

EXPERTS.

See APPEAL, 1, 2; WITNESSES, 2-7.

FERRIES.

See INJUNCTION; NEW YORK CITY, 3-7.

FORECLOSURE.

In foreclosure, the rejection of evidence to show the nature of the interest of a subsequent lienor is not error, when the existence of his lien and his right to dispute on the trial the amount claimed to be due on the prior lien are not disputed, and the trial of the issues joined resulted in determining the amount due thereon. *Clark v. Geery*, 227.

See GUARANTY.

FORMER ADJUDICATION.

See ESTOPPEL; JUDGMENT, 1.

FRAUD.

1. To maintain an action for fraud and deceit, based upon fraudulent representations, the representations must not only be false, but the party making them must believe or have reason to believe them false; and such representations must influence the other party to the contract. *Furman v. Titus*, 284.
2. A representation of the value of property, although untrue, will not authorize a recovery, where the vendee has an opportunity to examine the property and judge of its value. Such a representation is the expression of an opinion, the correctness of which the vendee is supposed to be as competent to judge of as the party making the same.

and an action for a deceit in misstating the value can not be maintained. *Ib.*

FRAUDULENT CONVEYANCES.

See CREDITOR'S SUIT, 1, 2; NEW TRIAL, 1.

GENERAL TERM.

See APPEAL, 8, 40.

GUARANTY.

1. Upon a guaranty of payment of bond and mortgage, provided that the mortgagee shall within sixty days after any default in payment of interest proceed without delay to foreclose, foreclosure is unnecessary, when it is not commenced until after the premises have been sold under a decree foreclosing a prior mortgage, the referee's deed delivered, and the proceeds disposed of pursuant to such decree. *Peck v. Cohen*, 142.
2. The guarantor is not liable for the cost of such unnecessary foreclosure of the guaranteed mortgage. *Ib.*

HANDWRITING.

See EVIDENCE, 1, 2.

HUSBAND AND WIFE.

See DIVORCE; PLEADING, 3-5.

INJUNCTION.

1. The sale of a boat used on a ferry between certain points as and for a ferry boat, immediately on the rendition of a decision directing an injunction against the seller restraining him from running a ferry between these points, and the continued use thereafter of the boat for the same purposes will, with other circumstances, constitute a violation of the injunction. *Mayor, &c., of New York v. New York*

and *Staten Island Ferry Co.*, 300.

2. Where there is an injunction against the running of a ferry between certain places, and after the injunction the point of departure at one of the places is changed from one wharf to another, the route in all other respects continuing to be the same, there is a violation of the injunction, notwithstanding such change. *Ib.*
3. An injunction against the use of a wharf for any of the purposes of a specified ferry on a specified route, is violated by laying the boat at the wharf during the night to take in supplies of coal and water, to be used on her ferry route the next day, and for the accommodation of the boat during the night. *Ib.*
4. In proceedings to punish for contempt for violating an injunction when the proceedings are initiated by an order requiring the party to show cause why he should not be punished for contempt, interrogatories are not necessary. *Ib.*
5. This although the order to show cause does not specify in what respect an injunction order is claimed to have been violated, and what punishment is desired. *Ib.*
6. Parties simply hearing that an order for an injunction has been granted, and disregarding it, can be adjudged guilty of contempt. *Ib.*
7. Service of a certified copy of an order of injunction granted by the court, is sufficient in contempt proceedings. *Ib.*

See ACTION, 4.

INQUEST.

See APPEAL, 39.

INSOLVENTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

INSURANCE.

1. Where by a contract for re-insurance between two insurance companies, the re-insuring company agrees to re-insure all the outstanding policies of the re-insured company, and to pay to the holders thereof, all such sums as the re-insured company might by force of such policies become liable to pay; and the re-insured company agrees to assign all premiums due and to become due on its policies, and the good-will of its business, to the re-insuring company; and the re-insured company thereupon ceases to transact business; a policy holder who has paid all the premiums on his policy which fell due before and at the date of the transaction may, without payment of the premiums thereafter falling due, recover from the re-insuring company the amounts paid by him for premiums, with interest thereon, although he is not a party to the contract of re-insurance. *Fischer v. Hope Mutual Life Ins. Co. of New York*, 291.
2. The bringing of an action against the re-insured company for the premiums paid and interest thereon, and prosecuting the same to judgment, is not a disaffirmance by a policy holder of the contract created by the policy. *Ib.*
3. A policy that states in the written portion the sum insured and the risk taken in the following words: "Sum insured six thousand two hundred and fifty dollars, port risk in port of New York, upon the body, tackle, apparel, and other furniture of the good ship called *The Confidence*," designates only such risk as is defined by the words "port risk in the port of New York," and designates no risk upon any part of a voyage to be made by the ship. *Nelson v. Sun Mutual Ins. Co.*, 417.
4. Oral proof may be given to establish what the risk was, and to show what risks were covered under the words, "port risk." *Ib.*
5. The commencement of a voyage from the port of New York terminated the risk under such a policy. *Ib.*
6. Policy insuring a mortgagor of chattels against loss on the mortgaged property, loss, if any, payable to the mortgagee, issued after the mortgagee's title had become absolute at law, by reason of the mortgagor's failure to fulfill the conditions of the mortgage, in neglecting to pay two installments of interest, and after the filing of a copy of the mortgage setting forth the mortgagee's interest in the mortgage as being to amount of the principal sum secured thereby, and said two installments of interest past due, the mortgagor never having taken possession, but the mortgagee having remained in undisputed and undisturbed possession of the property.—*Held*, the entire property is insured by the policy, and not merely the value of the property which might be realized upon sale over and above the amount due on the mortgage. *Smith v. Exchange Fire Ins. Co.*, 492.
7. Where the articles valued were very numerous, and had been in prior use for greater or less periods of time, and their depreciation depends on the quality of the material when new, and the skill of the workmanship in its manufacture, and upon the wear in the use, very great discrepancies in the opinions of all the witnesses, as to the value of the several items, furnishes the best proof that the claimant's estimates, though in many respects excessive, can not be considered presumptive

evidence of fraudulent intent. *Ib.*

8. In the valuation of numerous items, as between gross and itemized valuations, the itemized valuation should be taken. *Ib.*
9. Declarations by mortgagor, made after issue of policy, loss payable to mortgagee, are not admissible as against the mortgagee. *Ib.*

INTEREST.

See APPEAL, 25; DAMAGES, 10, 15.

INTERPLEADER.

1. Where the affidavit on which an order of interpleader was made was sufficient to authorize the same under § 122 of the Code, and the opposing affidavits do not show any real grounds for refusing such order, the order should be affirmed. *Wehle v. Bovey Savings Bank*, 97.
2. The validity of an order of another court, annexed to the moving papers, in support of the motion, could not be determined on the motion, but was a question to be determined on the trial of the action. *Ib.*
3. Collusion between the party to whose rights plaintiff succeeded and the party claiming under such an order of another court, was not sufficient ground for refusing such an order of interpleader, so long as the party applying for the same did not appear to be a party to such collusion. *Ib.*

JUDGMENT.

1. Dismissal of complaint on the merits in an action brought by a judgment creditor against the judgment debtor and a third party, in the nature of a creditor's bill to reach the judgment

debtor's assets in the hands of the third party, is not *res adjudicata* to a claim against such third person, in favor of the party who obtained the judgment, arising out of an agreement between the third party and the judgment debtor, whereby as between themselves the third party answered and agreed to pay the claim upon which the judgment was recovered. *Fischer v. Hope Mutual Life Ins. Co. of New York*, 291.

2. Where fourteen years had elapsed since the entry of judgment, and defendant had been examined on supplementary proceedings more than four prior to the motion, and no satisfactory answer or reason for the delay was shown,—*Held*, that the motion to open the judgment was properly denied on the ground of laches. *Wade v. De Leyer*, 541.
3. That a suit is pending by the defendant in the judgment against the plaintiff therein for an accounting, and the judgment sought to be opened is claimed to be simply the reduction into that form of collateral securities, constitutes no ground for opening the judgment, but, on the contrary, shows that there is no ground on which to sustain the motion, as the court in which the accounting suit is pending, can give all the protection which the equities of the case call for. *Ib.*

See APPEAL, 13, 14, 23, 36, 37, 42;
CREDITOR'S SUIT, 4, 5; ESTOPPEL; NEW TRIAL, 1, 2; PLEADING, 6, 7, 12;
SUPPLEMENTARY PROCEEDINGS.

JURISDICTION.

See DOMICIL; SUMMARY PROCEEDINGS; SUPPLEMENTARY PROCEEDINGS.

LANDLORD AND TENANT.

See NEW YORK CITY, 9-12; SUMMARY PROCEEDINGS.

LEX LOCI.

1. A contract or obligation valid by the law of the state where it was made and was to be performed, can not, when sought to be enforced in another state, be held invalid as contravening the usury law of that state. *Whitman v. Conner*, 889.
2. The fact that such contract or obligation is secured by a chattel mortgage executed in the state where the contract or obligation was thus made and to be performed, upon property in such other state, does not alter the rule. *Ib.*
3. Security for such contract or obligation upon property in such other state, is not invalid. As the principal debt is not invalid, although usurious according to the laws of such other state, so the security therefor is not invalid, notwithstanding it is on property in such other state, and the party holding it is obliged to come into the courts of such other state to enforce it. So *held*, where one basing his right on such security brought an action to recover the possession of the property from the sheriff who had taken it under an execution against a third person. *Ib.*
4. In transfers of personal property, the law of the state in which the property is at the time of the transfer governs as to the steps necessary to be taken to give it validity as against creditors or subsequent purchasers or encumbrancers, when the transfer is relied on in the courts of that state as the basis of an action or a defense, although the transfer may have been executed in another state, and for the purpose of securing an obligation made and to be performed there. *Ib.*

See APPEAL, 21, 22.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, when the facts are undisputed, or found by a jury, it is a question of law whether such facts show a want of probable cause or not. *Figueroa v. Knorr*, 41.
2. When the prosecution complained of was a criminal one for embezzlement,—*Held*, that the facts that the books kept by plaintiff in the course of his employment as book-keeper for the defendant, disclosed items entered in the petty cash book as drawn by him which were not posted in the general cash book, and also items entered in the general cash book which were not posted in the ledger, and also erasures in plaintiff's ledger account, true additions being erased and incorrect additions in plaintiff's favor substituted; that soon after plaintiff's attention was called to these matters, and payment demanded for what the books, upon a statement prepared from them by another book-keeper, showed to be due, he conveyed to defendant some real estate held by him, and his wife also conveyed to defendant some real estate belonging to her, which she refused to do until she was paid two hundred and fifty dollars, which was paid her; and that plaintiff admitted defendant's claim to be correct; are sufficient to establish such *prima facie* probable cause. *Ib.*
3. That plaintiff kept a memorandum-book in which he entered sums of money that he occasionally loaned to defendant, which book would explain the alleged improper credits he had given himself in his ledger account, and the apparent errors and discrepancies in the books of defendant kept by him, in a way consistent with his innocence of the charge of embezzle-

ment; that prior to defendant's complaint charging him with embezzlement, he explained to defendant that this book would show the amount loaned to him (defendant) by him (the plaintiff), and which he deducted from the ledger when he made out his cash account; that defendant asked to see the book, and plaintiff allowed him to take it, and he carried it away with him, and ever afterwards denied having it or having seen it; are sufficient facts to rebut such *prima facie* case of probable cause. *Ib.*

4. So too, the facts that prior to the setting on foot the prosecution for embezzlement, plaintiff offered to explain, with such memorandum-book, such alleged improper credits, and apparent errors and discrepancies, and that such book would so explain them, establish the want of probable cause. *Ib.*
5. In such an action evidence of the defendant's disbelief in the charge on which the prosecution was founded is competent as bearing both on the question of want of probable cause and on that of malice. *Ib.*
6. The fact that defendant, prior to the complaint against the plaintiff charging him with embezzlement, settled with him for the money, afterwards claimed to have been embezzled, as and for a debt on contract, express or implied, would tend to show such disbelief. *Ib.*
7. In actions for malicious prosecution, malice is implied, as a general principle, from want of probable cause. *Ib.*
8. If the defendant deprives the plaintiff of his means of exculpation, and then prosecutes him criminally,—such acts are on their face malicious. *Ib.*
9. Upon a recovery by the plaintiff in an action for malicious prosecution, indemnity is awarded for all the injury to reputation,

feelings, health, mind and person caused by the arrest, including the expenses of the defense. *Ib.*

10. The pre-existing business relations of the parties, conveyances from plaintiff and his wife to defendant, and a general release from defendant to plaintiff executed after the making of the charge and before the arrest, the circumstances surrounding the execution of such instruments, the impaired health and reduced circumstances and impoverishment of the plaintiff after his arrest, the appearance of defendant before two grand juries, are all facts bearing on the question of damages, and evidence respecting them is admissible. *Ib.*

MARINE COURT OF THE CITY OF NEW YORK.

See SUPPLEMENTARY PROCEEDINGS.

MARSHALLING ASSETS.

1. Assets can not be marshalled in an action to which all persons who claim to be, or may possibly be interested in the marshalling are not parties. *Molson's Bank of Montreal v. Howard*, 15.
2. *Comble*, one who discounts an acceptance can not be deprived of his recovery against the acceptors, because he holds collateral security from the drawer, and the state of the accounts between the acceptors and drawer is such, that if the acceptors pay the acceptance, the drawer will be indebted to them in a sum equal to a part, or the whole of, or exceeding the value of the collateral. *Ib.*
3. A *bona fide* holder for value before maturity of an accepted bill of exchange is entitled to recover in a suit against the acceptor, without reference to the equities between the original parties. *Ib.*

MASTER AND SERVANT.

1. The employment of a superintendent by the party who contracts for the work, to see that the work was properly done and in accordance with the contract, does not give the party the control of the work, to that extent that he becomes liable for the negligence of the employes of the contractor who are directly under the control and direction of the latter. *Clure v. National City Bank*, 104.
2. The right to select and employ and control the action of the workman or servant whose negligence is complained of, lies at the foundation of the responsibility of a master or principal for the negligent act of such workman or servant by which another person has been injured. The person who possesses and exercises that right, is the one recognized by the law as the master. *Id.*
3. In the case at bar the defendant and another, the owners of certain real estate in New York, contracted with different parties for extensive building improvements, alterations, and general repairs, upon the property owned by them. The persons who contracted to do the work employed the workmen, and controlled and directed them in their employment, and the plaintiff was injured by the carelessness and negligence of said workmen, or some one of them. The owners of the property employed a superintendent to see that the work was properly done according to the contracts and plans. This superintendent was aided and assisted by an architect, but neither the owners, the superintendent, nor the architect selected or employed the workmen or controlled and directed their labors. *Held*, that the defendant was not liable to the plaintiff for an in-

jury caused by the negligence of the workmen of the contractors, or some one of them. *Id.*

See DAMAGES, 15; SHIPPING.

MAXIM.

Locus penitentiae. Maxim applied. *De Witt v. Hastings*, 463.

MORTGAGES.

See FORECLOSURE; GUARANTY; INSURANCE, 6-9; LEX LOCI; SALES, 14.

MOTIONS.

See ACTION, 1, 2, 4, 13, 16; AMENDMENT; APPEAL, 12, 18-20, 26-30, 32, 33, 40; DISMISSAL OF COMPLAINT; JUDGMENT, 2, 3; NEW TRIAL; PLEADING, 9, 10; REFERENCE; TRIAL, 1, 18.

NEGLIGENCE.

1. Where there is no conflict in the evidence bearing on the issue of contributory negligence the question is one of law and not of fact. *Halpin v. Third Avenue R. R. Co.*, 175.
2. Plaintiff hailed a car going up when it was about seventy-five feet below the upper street crossing; at this time a car, then about one hundred feet off (which he saw), was rapidly approaching on the down-track; he crossed the down-track, and when he reached the space intervening between the two tracks (which was barely, if at all, sufficient to allow of standing there in any safety), he stood there waiting for the up-car to stop, which it did about seventy-five feet above the said upper crossing; its platform was crowded, which he knew; while in the act of getting on its platform the horses of the down-car, hav-

ing been pulled by the driver into this space, knocked him down. *Held*, as matter of law, contributory negligence. *Ib.*

3. When, for the purposes of fumigation of a vessel, under the direction of the health officer, the steward (as is his duty) clears the passengers from the steerage, and furnishes the health officers with the drinking vessels of the passengers, in which to put the fumigating compound, being a poisonous substance, and, after the fumigation, orders the passengers back to the steerage without having removed the drinking utensils, or seeing that they are thoroughly cleaned, he, knowing the character of the fumigating substance, is guilty of negligence. *Ryall v. Kennedy*, 347.

4. A mother allowing one of her children, of five years of age, to play about the steerage, in her presence, she not knowing any deleterious substance to be contained in the drinking vessels, is not guilty of contributory negligence. *Ib.*

5. This although she had seen the child take the cup to drink out of it. *Ib.*

6. The plaintiff, driving a light vehicle, was obstructed in crossing the track of a horse-car railroad by a blockade of trucks, so that he was obliged to stop with the rear part of his hind wheels on the track, and while in this position, a car approached, the driver of which, after waiting a moment or two, told the plaintiff to "get off the track," and the plaintiff asked him to wait until the trucks moved, promising then to move, whereupon the car-driver said, "Damn you! if you don't get off here; I am late; I will get you off some way or other;" to which the plaintiff replied, "You wait a moment; I guess the trucks are moving, and I may go." The trucks started,

and as the plaintiff prepared to move on, the driver of the car started his horses, and the platform of the car hit or touched the hind wheel of the plaintiff's vehicle, and overturned it, and caused the personal injuries to the plaintiff complained of. *Held*, a willful act was not necessarily established by the evidence. *Cohen v. Dry Dock, East Broadway and Battery R. R. Co.*, 368.

7. The car-driver may have attempted to pass either without hitting the vehicle or by shoving it around out of his way; and the hitting, or the force of the blow, may have been an error of judgment, in measuring the distance. *Ib.*

8. The language used by the driver does not necessarily indicate willfulness and malice. *Ib.*

9. A dismissal of the complaint in the case above stated,—*Held*, error. *Ib.*

See CARRIERS, 1, 2, 8, 9; DEATH; MASTER AND SERVANT; SHIPPING.

NEW TRIAL.

1. A judgment setting aside a transfer as fraudulent and void, appointing a referee to take the accounts of the transferee, and a receiver to whom the transferee shall deliver and pay according to the report of the referee, and directing that the receiver pay to the plaintiff his claim out of what shall come into his hands, and hold the residue, if any, to abide the further orders of the court, is not a final judgment, within the meaning of section 267 of the Code in regard to motions for new trials at a general term. *Produce Bank of New York v. Morton*, 328.

2. A judgment is not a bar to a motion for a new trial. *Laws of 1832*, ch. 128. *Ib.*

3. The rendering a verdict on conflicting evidence, contrary to a strong intimation from the court, and assessing against a corporation damages at three hundred and fifty dollars, for injuries to the plaintiff's feelings, and a slight pinching of his hands, in ejecting him from a car for alleged non-payment of fare, is not sufficient to establish that the jury was actuated by passion and prejudice, upon a motion for a new trial. *Hamilton v. Third Avenue R. R. Co.*, 376.
 4. Upon such motion, three hundred and fifty dollars damages in the above stated case can not be deemed excessive. *Ib.*
 5. Upon a motion for a new trial on the ground of newly-discovered evidence, the affidavit of the witness who is to give such evidence is requisite. *Gould v. Moore*, 387.
 6. In case such witness is dead, documentary or other proofs corroborating or establishing what it is alleged could have been shown by him are necessary. *Ib.*
 7. When the evidence claimed to have been newly-discovered is that there was a person who could have testified that he had paid for the services rendered, and the discovery was claimed to have been first made by such person stating to the counsel of the defeated party, a few days after the trial, that he had made such payment, but it appearing that such person, at the time of the rendition of the services was, and down to and after the trial (which covered a long period of time), had been on terms of intimacy with the defeated party, and had some connection with the transactions out of which the claim for services arose, — *Held*, that reasonable diligence had not been shown. *Ib.*
 8. That the successful party had frequently told the counsel for the unsuccessful one that such person had never paid him, does not excuse non-inquiry of such person as to the fact. *Ib.*
- See APPEAL, 12, 18-20, 33, 36, 37; EJECTMENT.
- NEW YORK CITY AND COUNTY.
1. The supervisors of the county of New York have power to provide suitable furniture, such as bedsteads, mattresses, and bedding, for the county jail. *Schenck v. Mayor, &c., of the City of New York*, 165.
 2. Ludlow Street Jail is the county jail of the county of New York. *Ib.*
 3. The mayor, aldermen, and commonalty of the city of New York own the exclusive right of the ferry franchise in and about the island of New York. *Mayor, &c., of the City of New York v. New York and Staten Island Ferry Co.*, 232.
 4. Such right is not confined to ferries established at the time of the Montgomerie charter, but extends to and includes all other ferries which the corporation might thereafter establish from Manhattan or New York Island to any of the opposite shores (*Benson v. The Mayor, &c.*, 10 *Barb.* 223; *The People v. The Mayor, &c.*, 32 *Barb.* 102; *Milhau v. Sharp*, 27 *N. Y.* 619). *Ib.*
 5. *Benson v. The Mayor, &c.* (*supra*), does not determine the question in respect to future ferries, but the right which that case held to be a vested right in the city, in respect to the established ferries, continued and attached to all that were at any time afterwards established. *Ib.*
 6. Any ferry operated and conducted from any part of the island to any opposite shore without the license of the corporation, is unlawful. *Ib.*

7. The Department of Docks have received no power from the legislature to grant a ferry license. *Id.*
8. The status and powers of the Department of Docks are fully considered and reviewed in the opinion of the court. *Id.*
9. The Board of Supervisors of the county of New York had no power to execute a lease for an armory for any portion of the National Guard of the state of New York, organized and existing within the limits of the city and county of New York, without a prior demand for the same, in conformity with section 120 of the act of the legislature of the state of New York, entitled "The Military Code;" and a lease executed by said Board without any prior demand having been made in conformity with said section 120, is wholly null and void. The doctrine of "*ultra vires*" applies to such action of the said Board of Supervisors. *Boller v. Mayor, &c. of New York*, 523.
10. A demand from the proper military authorities, duly made and countersigned, and a certificate from the Adjutant-General of the state (pursuant to said act) was a condition precedent to any action whatever on the part of the Board of Supervisors towards leasing premises for an armory. The indispensable conditions upon which rested any power or authority of the said Board of Supervisors to enter into such a lease were wanting, and in their absence no valid lease could be made. The rent for such premises could not and never did become a county charge, and any covenant on the part of said board to pay rent was null and void on the principle of "*ultra vires*." *Id.*
11. Neither the county nor the corporation of the city of New York was bound by this lease, nor could the appropriation of the premises to the use of the Eighth Regiment of the National Guard by a resolution of the Board of Supervisors, and its subsequent occupation and use by said regiment pursuant to resolution, be deemed such a ratification of such a lease as would render it obligatory in its terms upon said county or corporation. *Id.*
12. In the case at bar it appears that the plaintiff, in August, 1874, made complaint before the civil justice of the eighth district of the city of New York against the Board of Supervisors and the defendants in summary proceedings under the statute relating to landlord and tenant to recover the possession of said premises. That a summons was issued against said Board and these defendants, and duly served, but no appearance was ever made in said proceeding by these defendants or said Board. That judgment was finally rendered in said proceeding in favor of said plaintiff, and against said board and these defendants, in substance and effect, that the plaintiff should have possession of said premises because of the non-payment of the rent. Were the defendants estopped by this judgment from denying their indebtedness to the plaintiff for the use, occupation, and rent of said premises, claimed by him, in this action, and can the defendants in this action claim and assert the invalidity of this lease after such judgment? In brief, Does that judgment operate as an estoppel? *Held*, that the defendants were not estopped by that judgment, from pleading and establishing and resting their defense upon the invalidity of the lease. *Id.*

NOTARY PUBLIC.

See EVIDENCE, 6-11.

NOTICE.

See **APPEAL**, 40, 41.

OBJECTIONS.

See **APPEAL**, 1-8, 31, 34, 35;
TRIAL, 1-8.

ORDERS.

See **ACTION**, 1, 2, 15; **AMEND-
MENT**; **APPEAL**, 4-8, 12, 18-20,
26-30, 33, 38, 40; **INJUNC-
TION**, 4-7; **INTERPLEADER**;
PLEADING, 6, 7.

PARTIES.

See **ACTION**, 3-15; **COSTS**; **CREDI-
TOR'S SUIT**; **DEPOSITIONS**.

PARTNERSHIP.

See **CREDITOR'S SUIT**, 4, 5; **DEPO-
SITIONS**; **RECEIVER**, 1.

PLEADING.

1. A complaint that states the employment of the plaintiff by the defendants as their agent to do and perform certain work and labor and service for them, "upon certain conditions and terms, more fully set out in a certain memorandum of agreement, which is hereunto annexed, marked 'Exhibit A.,' and forms part of this complaint" (and a copy of such agreement was so annexed), does in fact set forth the whole of said agreement, and such a complaint is not objectionable on the ground of insufficiency. *Alfaro v. Davidson*, 87.
2. That an averment was not made in the body of the complaint, to the effect that the whole of the agreement was in writing, is wholly immaterial. Section 159 of the Code relaxes the strictness of former rules in regard to pleadings, when it declares, that in the construction of a pleading for the purpose of determining its effect, "its allegations shall be liberally construed with a

view of substantial justice between the parties," and with such liberal construction, this complaint will be deemed sufficient in all respects, and contains every element necessary to state a cause of action on the part of plaintiff for a breach of said agreement. *Ib.*

3. In an action of trover, defendant need not plead as an affirmative defense that he owned the property at the commencement of the action, nor show the source of, or mode by which he acquired, his title. A general denial of plaintiff's ownership suffices. *Bretvoort v. Bretvoort*, 211.
4. Where the strongest phrase in the pleading is "that the plaintiff relinquished all ownership" in the property, without any averment that defendant thereupon took possession as owner, no defense is set up. *Ib.*
5. *So held*, in an action by wife against the husband, the property in question being gifts made by him to her, when the answer alleged that the plaintiff violently threw the property from her, declaring that she returned it to defendant; that she would not keep it; and that she relinquished all ownership in it; and that defendant then took back the property as she desired, and kept possession of it. *Ib.*
6. On overruling a demurrer to an answer which does not go in bar of the whole cause of action, an order directing that defendant have judgment in the action in his favor, and a judgment entered therein adjudging that the complaint be dismissed, are erroneous; and such erroneous order and judgment will be reversed on appeal. *Ib.*
7. *Semble*, there should only be an interlocutory order and judgment, simply overruling the demurrer, and perhaps adjudging

- the answer so far as it extends to be a good defense. *Ib.*
8. A simple denial of an averment in the complaint that the claim or demand has been duly assigned to the plaintiff, will not let in evidence to establish that the assignment is invalid. *Clark v. Geery*, 227.
 9. In an action for damages for the conversion of a chose in action, facts showing it to have been of little or no value at the time of the conversion, may be allowed to be set up by supplemental answer, in mitigation of damages. *Cochran v. Hanover National Bank of New York*, 401.
 10. If the defendant is ignorant of the matters at the time of his answer, and moves without delay after discovering them, he is not guilty of laches. *Ib.*
 11. Where the opposing papers deny insolvency, but it appears that the draft, the parties to which were claimed to have been insolvent, was not paid at maturity, and other matters appeared tending to show insolvency, a case is presented for a disposal of the question by trial. *Ib.*
 12. In an action to recover the possession of personal property, where the answer alleges that as to a portion of the property the defendants renounce all claim or interest thereto, and offers plaintiff a judgment as to that portion, with costs, &c., and upon an issue as to the rest, which was tried before a referee, the referee erred in finding that the defendants were entitled to the return of all the property mentioned in the complaint without exception, or its value, fixed at five hundred and fifty-four dollars, the referee should not have included the value of the property in regard to which, by the answer, the defendant had renounced all right and interest. *Cochran v. Gottwald*, 442.
 13. An answer will not be regarded as pleading a counter-claim which merely asks that the sum therein mentioned may be set-off against any sum that may be allowed to the plaintiff. *American Dock and Improvement Company v. Staley*, 589.
 14. The defense of set-off needs no reply. *Ib.*
 15. In an equitable action, the defense that plaintiff has a perfect remedy at law, must be presented by the answer, otherwise it is not available at the hearing. *Bell v. Spotts*, 552.
- See ACTION, 1, 2, 16; AMENDMENT; APPEAL, 4, 5; COUNTER-CLAIM; SALES, 3, 4.

PRACTICE.

An examination of parties to the action under § 391 of the Code and Rule 21 of the supreme court, may be held immediately after the service of the summons. Under this statute there is no limit to the time when the examination may take place, after the commencement of the action. And the language of Rule 21 does not necessarily call for any other construction. *Glennay v. World Mutual Life Ins. Co.*, 92.

See ACTION; AMENDMENT; APPEAL; COSTS; DEPOSITIONS; DISMISSAL OF COMPLAINT; REFERENCE; TRIAL.

PRESUMPTIONS.

See EVIDENCE, 4, 5; INSURANCE, 7-9.

PRINCIPAL AND AGENT.

See BROKERS; COUNTER-CLAIM, 4.

PRINCIPAL AND SURETY.

1. In this state, sureties, upon performance by them of their contract in regard to their principal, are entitled to the original evidences of debt held by the creditor, and to any judgment in which the debt has been

merged, as well as to all collateral securities held by the creditor. *Fielding v. Waterhouse*, 424.

2. The right of the surety is not only that of subrogation, pure and simple, but a right to an assignment by the creditor. *Ib.*
3. Performance of the conditions of the suretyship discharges the principal obligation, so far as the existence of any interest of the original creditor in the same; but the original debt is kept alive as between the creditor and debtor and the surety, for the purpose of enforcing the rights and interest of the surety therein, as against the debtor, his principal. *Ib.*
4. A co-surety has the same responsibility for preserving and keeping alive securities, liens, and liabilities against the original debtor, in favor of his co-surety from whom he claims contribution, as a creditor has in behalf of sureties from whom he claims payment or fulfillment of the original obligation. *Ib.*
5. If a creditor releases or satisfies any security which he holds against the principal debtor he must answer for the value of what he releases or satisfies. *Ib.*
6. The burden of proof, as to the value of the release or satisfaction, rests upon the party releasing or discharging. *Ib.*
7. In the case at bar, a judgment was satisfied and discharged against the original debtor by the consent and action of one of the sureties, who now seeks contribution from his co-surety for the amount paid by him, and the former should answer to the latter for its discharge and satisfaction, and the burden of proof as to its value rests upon the surety who discharged and satisfied the same. *Ib.*
8. By analogy it is right to apply the general rule of damages to this case, namely: that when the amount of value is made in-

capable of estimation by the act of the wrong-doer, he must be held responsible for the value that by any reasonable possibility the same may prove to be, as in this case, the full amount of the judgment that was satisfied. *Ib.*

PROMISSORY NOTES.

See DAMAGES, 12, 13; EVIDENCE, 6-11.

QUESTIONS OF LAW AND FACT.

See MALICIOUS PROSECUTION, 1; NEGLIGENCE, 1.

RAILROADS.

See CARRIERS, 8-9; NEGLIGENCE, 1, 2, 6-9.

RECEIPTS.

See CONTRACTS, 3-5.

RECEIVERS.

1. The appointment of a receiver of the effects of a copartnership, and the transfer of the same to him, &c., does not operate as a rescission on the part of the copartnership of a contract between the copartnership and one of its employes. *Bird v. Austin*, 109.
2. It is doubtful whether, when a receiver and the person for whose benefit he was appointed, and whose interests alone he defends, are both parties to the action, the receiver can insist on a defense not insisted on by the party for whose benefit he was appointed. *Clark v. Geery*, 227.

See SUPPLEMENTARY PROCEEDINGS.

REFERENCE.

1. A motion to set aside the report of a referee should be made before judgment is finally entered, for, if successful, it would prevent the entry of a judgment.

It would be useless work to vacate and set aside the report and yet allow the judgment to stand. *Macpherson v. Ronner*, 448.

2. In the case at bar, the referee allowed the plaintiff to amend his complaint on motion, giving the defendant twenty days to serve an amended answer, to which defendant objected and excepted, and refused to amend his answer, but afterwards went on with the defense on the trial, and after report and judgment thereon, he moved to set aside the report on the ground that the amendment so allowed by the referee was improper. *Held*, that this motion was too late. *Id.*
3. The defendant could have contested this question by a special motion to the court, at the time, for an order setting aside the amendment. In this way the matter could have been simply and expeditiously disposed of before the trial was concluded, if a motion in such a case was proper. It is too late to raise the question after the trial, report and entry of judgment, except on appeal from the judgment. *Id.*
4. The report, having become incorporated with the judgment, can not be detached and considered apart from it. The report and judgment must stand or fall together. *Id.*

See APPEAL, 42; TRIAL, 3.

RE-HEARING.

See APPEAL, 15-17.

REPLEVIN.

See PLEADING, 12.

REPLY.

See PLEADING, 14.

REVIVOR.

See ACTION, 3-15.

SALES.

1. A special contract for payment in a particular mode does not interfere with the maintenance of an action for the price of goods sold and delivered, when the defendant, upon being duly and properly requested to make payment in the mode prescribed, refuses so to do. *Patterson v. Stettlauer*, 54.
2. Thus, drafts drawn as per special agreement by the vendor on the vendee for payment do not interfere with the maintenance of the action, when the drawee refuses to either accept or pay the drafts, and at the commencement of the action they remain unpaid and unaccepted in the vendor's hands. *Id.*
3. A complaint which avers that defendant agreed with plaintiff in consideration of plaintiff's delivering to him certain goods, to accept, honor, and pay the drafts of the plaintiff on him, for the value of such deliveries, provided such drafts were indorsed as correct by a person named in the agreement; that plaintiff in pursuance of such agreement delivered a large quantity of goods of the value of thirty thousand dollars, and drew on defendant five drafts amounting in the aggregate to eleven thousand six hundred and four dollars and twenty-five cents, which were indorsed as correct by the person named in the agreement, and were duly presented to the defendant for acceptance, who refused to accept, honor, or pay the same; that plaintiff is the lawful owner and holder thereof; that by reason of defendant's failure to accept, honor, and pay said drafts, plaintiff has suffered damage in the sum of eleven thousand dollars; and prays judgment for damages in eleven thousand dollars, states a cause of ac-

- tion on the contract for that part of the value of the goods delivered for which the drafts set forth in the complaint were drawn. *Ib.*
4. The averments as to the drawing of the drafts, the presentment of them, and the refusal to accept, honor, or pay, and the ownership of them, and the averment "by reason of the defendant's failure to accept, honor, and pay said drafts," do not necessarily make the action one based solely on a cause of action for damages for refusal to accept. *Ib.*
 5. A charge that if the defendant did or said anything from which plaintiff had a right to suppose that the sale was being made to him and not upon the responsibility of any other party, he would be himself liable, without adding the proviso, "if the plaintiff meant to sell to him," or some phrase of similar import, does not constitute error. This proviso is implied in the words of the charge; for plaintiff could have no right to suppose that a sale was being made to defendant unless he had done or said what was necessary to make himself a party thereto. *Fiske v. Allen*, 76.
 6. The original order being in writing purporting on its face to come from a person other than the defendant, and by that person written in the order book, and it being brought out on plaintiff's cross-examination that the sale was entered in the other books as being made to such other person, the admission of evidence on the re-direct, that the entries in the other books were taken from the entry in the order book, is not cause for reversal. It did not injure the defendant. *Ib.*
 7. Where the defendant introduces proof that by a contract between him and the person to whom the plaintiff charged the goods, he was bound to pay such person for the goods, it is not error to allow the plaintiff to prove that defendant has not paid such person. This is an application of the principle that proof otherwise immaterial and improper, may by the course of the trial become material and proper. *Ib.*
 8. Entries in books of account making charges against a particular person, are not conclusive evidence that the credit was given to such person. *Ib.*
 9. To establish a sale of goods by sample, the general rule is that it must clearly appear that the contracting parties mutually understood and agreed that they were dealing by sample, and that the agreement was, that the bulk of the goods not exhibited was equal in value and corresponded in quality to the sample of the same exhibited to the purchaser. *Cousinery v. Pearsall*, 113.
 10. The exhibition of a portion of the goods, purporting to be a sample, is not a fact of itself sufficient to make the seller liable on an implied warranty in regard to the nature, value, and quality of the goods being equal to the sample. *Ib.*
 11. The seller must represent and warrant that the goods sold correspond, and are in all respects equal in value and quality to the sample displayed. *Ib.*
 12. Proof of a tender of a portion of the goods sold, and a refusal or rejection of the same, or a refusal to receive the bulk of the goods, is equivalent to a complete delivery of the whole. *Ib.*
 13. Upon a re-sale of property once sold to a party who refuses to accept and pay for the same, the general rule requires that the identical property sold should be separately sold in mass or by lot, and the original buyer credited with the pro-

- ceeds of such sale. The goods should not be mingled with other like property. But if from the nature of the case such separation and separate sale was impracticable, and the general amount of like property was sold without being specifically separated from other like property, then and in such case the highest value obtained for any one lot of said property thus resold, should be taken as the price or value for which the original buyer should be credited. *Ib.*
14. The effect of a redemption clause contained in an instrument in form of a bill of sale of personal property, is only to give a right of redemption; it does reserve the right of possession to the party making the instrument, but the party to whom it is made is entitled to possession against the maker. *Willner v. Morrell*, 222.
15. In an action to recover damages for the non-delivery of property under a contract of sale, it appeared that the defendants were to deliver during all the season, which gave them until the first day of January to complete the delivery. *Held*, that as a necessary preliminary to this action, the plaintiff should at the close of the season have made his demand for the delivery, and should have proved defendant's refusal to deliver on the trial. *Isaacs v. New York Plaster Works*, 277.
16. Proof of readiness to receive and ability to pay is essential where the time and place of the delivery has not been fixed by the contract and where the place is to be designated by the party who is to receive the same. *Ib.*
17. If the vendee under a contract of sale with express warranty receives the articles, examines them, and returns them without raising any objection on the ground of non-conformity with the warranty, and without making any offer to return them, and without notifying the vendor to take them back, he can not raise the question of non-conformity. *Cohen v. Platt*, 483.
18. The words "approved standard quality," do not constitute an express warranty; these words do not raise an express warranty. It is another expression for a merchantable article. *Ib.*
19. The measure of damages recoverable by the vendor on refusal by vendee to accept, is the difference between the contract price and the market value at the place of delivery. *Ib.*
20. When the contract was made at a certain place, say the city of New York, to which the merchandise was to be shipped from another place, and delivery was to be made by the delivery of the invoices and bills of lading at the city of New York, and payment was to be made at that city, the place of delivery is the city of New York. *Ib.*
21. That the merchandise is, according to usual custom, shipped at the risk of the vendee, does not alter the rule. *Ib.*
- See **BILLS OF EXCHANGE**, 8;
BROKERS; FRAUD.
- SERVICES.**
- See **DAMAGES**, 15; **EVIDENCE**, 16;
MASTER AND SERVANT;
RECEIVERS; WITNESSES, 6, 7.
- SET-OFF.**
- See **COUNTER-CLAIM; PLEADING**, 14.
- SHERIFFS.**
1. In an action against a sheriff for the non-return of an execution, the facts, that warrants of attachment had been issued to and were then held by the

sheriff against the property of the judgment creditor: that he had served copies thereof on the judgment debtor, with a notice that he levied upon and attached all goods, chattels, and credits in his hands belonging to the judgment creditor, and upon all debts due the judgment creditor from the judgment debtor, and that he had received from the judgment debtor a certificate under the warrant that he was indebted to the judgment creditor in the amount of the judgment, and that such judgment remained in full force and effect, will not constitute a defense. *Wahle v. Connor*, 24.

2. *Semble*, if the court sees fit to stay the proceedings or to direct that the money be retained in the sheriff's hands after he had collected the amount out of the property attached, or to order it to be paid into court, an excuse may arise for a sheriff omitting to execute and return the execution. *Ib.*

SHIPPING.

1. The captain of a merchant vessel is personally liable for injuries caused by the negligence of his subordinates during the voyage, among them the steward. *Ryall v. Kennedy*, 347.
2. The position of the captain of a public armed vessel is different from that of the captain of a merchant vessel. *Ib.*
3. The voyage is not ended until the vessel is moored at her point of destination. The master's liability continues until then. *Ib.*
4. The visit of the health officer does not relieve the master; it does not divest him of his general power and control. *Ib.*

SPECIAL TERM.

See APPEAL, 8, 23, 38, 43.

STATUTE OF FRAUDS.

See CONTRACTS, 1, 2.

STATUTES.

See APPEAL, 21, 22; EVIDENCE, 6-15; LEX LOCI.

STIPULATION.

See APPEAL, 16, 17, 42, 43.

SUMMARY PROCEEDINGS.

1. In summary proceedings to recover possession of premises under the statute (2 R. S. 515, § 41), no adjournment can be made except upon the request of a party to the proceedings, and for the purpose of enabling such party to procure his witnesses. *Boller v. Mayor, &c. of New York*, 523.
2. The statute, in authorizing adjournments for a specified purpose, and upon a specified request, impliedly prohibits all adjournments except such as are so expressly authorized. *Ib.*
3. The officer or magistrate before whom the proceeding is pending exceeds his jurisdiction by an unauthorized and illegal adjournment, and he is precluded from the further hearing or the exercise of jurisdiction in the case, and all his future acts and proceedings in the case are void. (Many cases cited in the opinion of the court on this point.) *Ib.*

SUPERVISORS.

See NEW YORK, 1, 2, 9-12.

SUPPLEMENTAL PLEADING.

See PLEADING, 9, 10.

SUPPLEMENTARY PROCEEDINGS.

1. In supplementary proceedings instituted under § 294 of the Code, after issue but before return of execution, this court has no power to appoint a receiver. § 298 does not give

power in such a case. *Holbrook v. Orgler*, 33.

2. The marine court and its judges have, in respect to judgments recovered in that court, all the powers and authority enumerated in and conferred by chapter 2, title 9, part 2 of the Code (supplementary proceedings). *Ib.*
3. The filing of a transcript does not divest or affect such powers and authority. *Ib.*
4. A judgment debtor can not be subjected to several successive examinations unless the creditor can show specifically that facts arising after one examination call for further examination. *Irwin v. Chambers*, 432.
5. The same rule applies to an examination upon a judgment recovered upon a former judgment, upon which these proceedings had been taken, and the defendant examined, &c. *Ib.*
6. In order to justify an examination under such a judgment, the judgment creditor must show specially that facts have arisen since the former examination that call for and justify another examination. *Ib.*

SURETIES.

See PRINCIPAL AND SURETY.

TRADEMARKS.

See ACTION, 4.

TRIAL.

1. If the answers of a witness are irresponsible to the questions, the party deeming them prejudicial must move to strike them out. *Fagnan v. Knox*, 41.
2. Overruling an objection to an improper question does not constitute cause for reversal where the answer was proper and competent evidence. *Ib.*
3. That the referee reserved his decision on objections to evidence, and received the evidence

subject to the reservation, is not cause for reversal, when the evidence thus received is either relevant or not calculated to injure the objecting party. *Mercer v. Vose*, 218.

4. In the case at bar, the action was to recover from defendant, upon an agreement to pay to the plaintiffs one half of all losses sustained by them in consequence of the bad debts arising from any and all sales made by or through one Bannon, a salesman; and a schedule or list of debts claimed by them to be bad, was attached to the complaint. The jury found a sealed written verdict for plaintiffs for eight hundred and thirty-seven dollars; and added, the judgment and debts mentioned in the schedule, viz., sixteen hundred and seventy-four dollars, to be assigned to the defendant for his benefit. *Held*, that such a verdict was void. It was not such a verdict as could properly have been found under the issues submitted to the jury. They could only find for the plaintiffs, assessing the damages, or generally for the defendant. *Herzberg v. Murray*, 271.
5. The award of the bad debts, which formed the subject matter of the action, was not within the province of the jury. *Ib.*
6. The jury should have been required to correct it. The court could not do it for them. *Ib.*
7. Upon the reception of a sealed verdict which is imperfect in substance or form, the court may cause the jury to retire and correct it. After it is received and recorded it can not be altered. *Ib.*
8. If the alteration, however, is merely as to the form of the verdict, and not affecting its substance, it would not be cause for setting it aside. *Ib.*
9. In the case at bar, the court held that this verdict could not

- be amended or altered by the court, by striking out the portion relating to the assignment of the bad debts, as thereby it would no longer be the verdict returned. Such an amendment was one affecting its substance, and could not be made by the court. *Ib.*
10. The examination of a party before trial at the instance of the adverse party, precludes any further examination at the trial on the same subject-matter by the party at whose instance the examination before trial was had, and who at the trial read such examination, unless some reason or excuse is shown, such as the omission by inadvertence to ask some questions, or prove some facts. *Wilmont v. Meserole*, 321.
11. In an action of tort against a number of defendants, when the evidence is such as would uphold a verdict in favor of one or more, although rendered against the others, each of the defendants in whose favor a verdict might have been rendered, is entitled to a charge to the jury that they might find in favor of one or more of the defendants, even if they did not find in favor of all. *Kenyon v. Sherman*, 363.
12. A refusal so to charge is error which is cause for reversal. It is the privilege of each defendant to have his case passed on by a jury having full knowledge that they could find in his favor, and against each of the other defendants. *Ib.*
13. This although all the defendants join in the same answer, and set up the same defenses. *Ib.*
14. A charge that a certain question of fact is not involved, is not erroneous when there is no sufficient evidence in support of the fact. *Hamilton v. Third Avenue R. R. Co.*, 376.
15. The court is confined, in its instructions, to the scope and province of the proofs. *Ib.*
16. After the jury have announced their verdict, but before it is recorded, the court may, if it appear to be a mistaken one, send the jury back for a further consideration. *Hegeman v. Cantrell*, 381.
17. Where issues are framed in an equity cause for trial by a jury, decisions made during the trial, and the verdict itself, as to being supported by sufficient evidence, may be reviewed only, either on the hearing of the cause at special term for the trial of equity causes, or on a case with exceptions, to be made and settled as provided in other cases, or on a motion upon the minutes. *Ib.*
18. The court, at the ultimate hearing and disposal, exercises its discretion, and it is not precluded from rejecting the verdict, and ordering a new trial, or from finding the question of fact itself. *Ib.*
19. Three questions were framed for trial by jury. The judge charged the jury that if they found the first two in the affirmative, they should render a certain specified finding on the third, but if they found the first two in the negative, then they should render a certain other specified finding on the third. The jury retired, and brought in a verdict finding the first two questions in the negative, but finding the third in the manner in which by the charge they were authorized to find only in case of finding the first two in the negative. The court refused to receive the verdict, repeated its charge, and sent the jury back for further consideration. The jury returned with a verdict finding the first two questions in the negative, as before, and as to the third, in the manner in which by the charge they were directed to

find it in the event of finding the first two in the negative. The verdict was against the defendant. The cause was then brought on and heard at a special term as an equity cause. No evidence was offered by the defendant. Judgment was rendered for the plaintiff. Afterwards defendant moved to set aside the verdict on affidavits and the judgment roll. *Held*, 1. That on such a motion, which brought neither the evidence nor the charge before the court, the question as to whether there was error in the charge, could not be entertained. 2. That from so much of the charge as was before the court there seemed to be an inconsistency in the first verdict which authorized the trial judge to refuse to receive it, and send the jury back. *Ib.*

20. Where a cause is reserved generally on the trial calendar, two days' notice to place on a day calendar for trial must be given to all defendants who answer separately by different attorneys. *Seaman v. McReynolds*, 545.

21. A default taken against one of such defendants without notice to his attorney is irregular, and must be set aside. *Ib.*

See APPEAL, 1-3, 10, 26-30, 34, 35; DEPOSITIONS.

USER.

See CORPORATIONS, 10-17.

USURY.

See LEX LOCI.

VERDICT.

See TRIAL, 4-9, 16-18.

VESSELS.

See SHIPPING.

WAREHOUSEMEN.

See CARRIERS, 5-7; CONTRACTS, 3-5.

WARRANTY.

See SALES, 9-11, 17, 18.

WITNESSES.

1. In an action for divorce a vinculo matrimonii, the defendant, under the act of 1867 (Laws of 1867, ch. 887), is incompetent as a witness for any purpose other than proving the fact of marriage. *Roe v. Roe*, 1.

2. Where the question at issue is the condition of health of body and mind of a particular person, laymen may state acts they have observed, and may sometimes give their impressions formed at the time as to whether the acts so observed were rational or irrational. The case at bar does not call for the strict application of the rules pertinent to the inquiry as to whether a person is *non compos mentis* or of testamentary capacity. *Fagnan v. Knox*, 41.

3. Upon the examination of a witness as to value, he must preliminarily be shown (if so required in proper time by the party against whom the witness is called) to be acquainted with the value of like property, services, &c., with that as to which he is to testify. *Mercer v. Vose*, 218.

4. If such preliminary proof has not been so required, the testimony of the witness as to value can not be stricken out on the ground that it has not been given. *Ib.*

5. In such case the burden rests on the party against whom the witness is called to show his disqualification. *Ib.*

6. In answer to a question, "Do you know the value of the services of an agent whose duties

are confidential and embrace such duties as you know that plaintiff performed during the period you have testified to?" the witness said, "I can state what I know as to persons doing the same; leave the confidential out, and I should say yes." He then, under objection, testified to the value. *Held*, no error. 1. His answer is as to the value of services irrespective

of their confidential character. 2. The fact that they were confidential did not lessen their value. *Ib.*

7. That the witness preliminarily stated that he did not profess to be an expert, does not disqualify him as a witness to value if sufficient facts appear to show that he was competent. *Ib.*

See *APPEAL*, 1-3; *TRIAL*, 1, 2.

6: 5-1-1



HARVARD LAW

